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A  
REPORT  
Of all the  
CASES

determined by Sir John Holt, Knt.  
from 1688 to 1710, during which  
Time he was Lord Chief Justice of  
England.

CONTAINING

Many Cases never before Printed, taken from the  
Original Manuscripts of *Thomas Twiss, Esq.* late of  
the Middle Temple, Barrister.

AND

Several Cases in Chancery and the Exchequer-Chamber.

The whole Alphabetically Digested under proper Heads.

BY

THOMAS TWISS, The Son of the Learned Judge, who lived at the  
General Bar, and was 7 Years of the Principal Masters.

IN TWO VOLUMES.

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W I T H

Three Tables: The First of the Names of the Cafes; the Second of the  
General Titles; and the Third of the Principal Matters.

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In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer*, Esq;)   
for J. Hazard, C. Osborne, J. Mozrall, C. Corbett, C. Ward  
and R. Chandler, J. Wood, C. Waller, and G. Hawkins.

M.DCC.XXXVIII.

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# T H E P R E F A C E.

**T**HE following Sheets are intended to contain a Collection of all the Cases adjudged or decreed while that *Illustrious Lawyer, Sir John Holt*, was Lord Chief Justice of England, in which he gave either his Judgment or Advice: Being for the most part at the Common Law, in his own Court; and some of them in Equity, where he was sometimes called to assist in Causes of Moment or Difficulty. The greater number of these Cases is to be found at Large in the Books of Reports of his Time, viz. from the Revolution to the Close of the Year 1709, and they are generally abridged in this Collection: The rest have been procured in Manuscript at a considerable Expence. These latter are here printed at Large; and we are well assured that not a few of them were taken by Mr. Farresley, the Author of a thin Volume of Reports of Cases in the first Year of Queen Anne, well received in Westminster-Hall.

The Reader will observe a particular Care and Attention to furnish him with whatever was said by Lord C. J. Holt. There is a Clearness and Perspicuity

A

*spicuity of Ideas when he defines; a distinct Arrangement of them when he divides his Subject; and the natural Difference of Things made obvious, when he distinguishes between Matters which bear an untrue Resemblance of each other. Having thus rightly formed his Premisses, he hardly ever errs in his Conclusions; His Arguments are instructive and convincing, and his Integrity would not suffer him to deviate from Judgment and Truth in Complaisance to his Prince, or to either House of Parliament: And they all paid that Regard to Justice, in the Person of Lord Holt, as not to be offended at his Decisions; several of which seemed to cross upon their own Interests or Determinations. There is an Instance of each sort in this Collection.*

*The Character of this consummate Judge is more highly esteemed among the Gentlemen of the Long Robe, than we shall presume to describe; and the Authority of his Judgments is proportioned to that Esteem. We have therefore chosen to make our Collection as Copious as possible.*

*To write a compleat Abridgment of the Common Law, may justly, at this Time of Day, be thought a Work too extensive for any one Person to undertake. Such a Work, or rather a Digest of our Laws, is worthy of a Juncto of the first Men in the Profession; of an English Tribonian and his Fellows. When that shall be effectually performed, the seeming Contradictions of the Reports shall be reconciled, and those Cases shall be thrown aside which have been denied by later Authorities, and upon better Reasons: And then the recorded Dicta and Responsa of*

I

Hale,



Hale, Holt, and Lee, will be written down for Text-Law; as in the Roman Digest we find those of Paulus, Ulpian, and Papinian. 'Till something of this Kind can be brought to pass, Abridgments must be of Use, (if for no other Reason) by their bringing many adjudged Cases briefly to the Reader's View, that he may the more readily find his Authorities in the Hurry of his Practice.

The Method observed in Salkeld's Reports has had the general Approbation, therefore is imitated in this Collection. Lord Coke is of Opinion that the latest Reports are the most useful: And this seems to be founded in Reason, as well as to be supported by that Venerable Authority. If this be right, we doubt not but that the ensuing Pages will prove something more than a Repertory to the most useful Set of Cases hitherto published in the Common Law.





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QUI Tam, & Tam Quam. <i>Ibid.</i>	Tithes. 673
R.	Tolls. 674
REcognizance. 611	Trade. 676
REcords. 613	Traverse. <i>Ibid.</i>
REcoveries. (See <i>Uses</i> ). 614	Treason. 696
RElease. 619	Trespas. 701
REmainders. 623	'Trials. 701
REmittitur. (See <i>Abatement</i> ). 625	Trover. (See <i>Administrator, Bills of Exchange, &amp;c.</i> ) 707
REplevin. 626	Trusts. 708
REscue. (See <i>Leases</i> ). 628	
REstitution. 629	V.
REturn of Writs. <i>Ibid.</i>	VAgrants. 709
RIots. 635	Venue. (See <i>Appeals and Trials</i> ). <i>Ibid.</i>
RObbery. 637	Verdict. 713
S.	View. 714
SCandalum Magnatum. 640	Vifitors. 715
SCire Facias. (See <i>Abatement, Ejectment and Error</i> ). <i>Ibid.</i>	Uses. (See <i>Fines and Release</i> ). 730
Servants. 641	Ufury. 738
SEffions. 642	
Sewers. 643	W.
Sheriffs. (See <i>Execution</i> ). <i>Ibid.</i>	WAger of Law. 740
SHips. 647	Wills. (See <i>Estate</i> ). 742
Simony. 651	Witnesses. 752
Slander. 652	Women. 758
Soldiers. 655	Wreck. <i>Ibid.</i>
Spiritual Courts. 656	Writs. 759

### E R R A T A.

Page 25. Line 5. after *had*, read *no*. p. 187. before l. 7. add CUSTOMS. p. 187. in the Margin, for (14.) (15.) read (1.) (2.) p. 206. in the Margin after l. 6. read *was*, whether it. p. 350. l. 14. for *esse*, read *est*. p. 356. l. 32. for *lanquebat*, read *lanquebat*. p. 448. l. 28. for *Considerations*, read *Commissions*. p. 553. l. 4. after *shown*, read *a*.



# ABATEMENT.

Rawlinson *versus* Oriet & al. Mich. 1 W. & M.

**I**N Action of Trespass against two Defendants: They pleaded in Abatement that the Plaintiff had sued a Bill against one of them for the same Trespass, which was yet depending: The Plaintiff demurred, and it was argued for him that this does not abate against the other. (1.) 1 Show. 75.

Holt Chief Justice: The Reason why another Action pending shall abate the subsequent Action is, because of the double Cleration; now here the other is not vexed, and therefore there is no Reason that it should abate as to the Whole. If you plead a Misnomer, it shall abate only as to the Party pleaded, unless where the Death of one shall abate the Writ, as upon a joint Contract, &c. But it is otherwise in Trespass.

Howard *versus* Pitt & al. Trin. 4 W. & M.

**I**N Trespass, a Verdict and Judgment were had against Sir John Lawrence, Sir William Pritchard, Sir Benjamin Newland, Sir Edward Abney, George Pitt, Esq; and James Smithby, for 1515 l. Damages and Costs. The Defendants brought a Writ of Error, and the Record being certified into the Exchequer-Chamber, Smithby died, and the surviving Defendants, fearing the Writ of Error was abated by his Death, brought another Writ in the Name of the five Survivors, which was allowed and Bail put in, and there was no Non-Process nor Affirmation of the Judgment, nor any Remittitur of the Record upon the Writ on which it was certified: But Sir John Lawrence dying, the Plaintiff brings an Action and arrests the Defendant Pitt for 1515 l. Debt, and after a short Imprisonment, charges him with an Execution sued out only against four of the Defendants, but never removed the Judgment by Scire facias. (2.) 1 Show. 402, 403, 404. 1 Salk. 261. S. C. Yelv. 7. 3 Cro. 891.

2 Cro. 364.  
Palm. 186.  
Sid. 351.  
2 Keb. 307.  
3 Cro. 367.

It was moved by the Counsel for Mr. Pitt, to discharge this Execution; for that there ought to have been a Sci. fac. in regard the Judgment was of three Years standing, and not affirmed on the Writ of Error; and no Execution should have issued, until the Second was remitted back out of the Exchequer-Chamber; And the Judgment being against six Persons, and some dying, Execution ought not to have gone against the rest, without a Scire facias. That this Court cannot take Notice of an Abatement, or other End of the Writ of Error but upon a Remittitur, which there ought to be, because the Act of Parliament that erects the Court says, the Record shall be sent thither, and afterwards remitted, that so Process and Execution may be done thereupon: And the Plaintiff ought to pursue his Judgment, and every Writ of Execution follow and agree with the Record; that there should be no Execution where the Writ was abated, and after a Year, without bringing a Scire facias, &c.

Moor 367.  
Noy 130.

To which it was answer'd by the Plaintiff's Counsel, that there needs no Remittitur nor Scire facias, for Execution might have issued against them all, without taking Notice of any Man's Death; and then the mentioning the Death of one cannot injure the rest. In Case of a Verdict against four, and one dies, we may alledge that one is dead, and pray Judgment against the others: And if one of the Defendants die after Judgment, there is no Abatement of any judicial Process; nor any need of a Scire fac. but where the Parties are alter'd, and they are not so here.

1 Roll. Abr.  
899.  
15 H. 7. 16.

By Holt C. J. There ought to be a Remittitur in Case of an Abatement, as well as in Case of a Nonsuit or Discontinuance, being equally within the Words of the Statute, for neither of them are expressly there: You might have had Judgment on a Sci. fac. quare Execution. non; but to have Prosecution immediate without any Notice to us of what is become of the Writ of Error, I do not understand. I think you cannot have an Execution after the Year without a Scire facias, or Remittitur: Here is a Year expir'd, and pray how do they stop upon the Death of one of the Plaintiffs? If they take Notice of it, they ought to remit for that Cause: And of that Opinion was all the Court.

But the Court would not relieve the Defendant upon Motion, nor determine any Thing on the last Quære; so that Mr. Pitt paid the Money.

Lee *versus* Barnes. Mich. 7 W. III.

Holt C. J. **T**HE Defendant may plead in Abatement of a Declaration where the Action is by Original, for the Pleas therein are different; but if the Action is by Bill, there can be no Plea in Abatement of the Declaration, only of the Bill, because they are the same Thing, and the Entry is Petit Judic. de Billa. (3.) Mod. 144.

West *versus* Sutton. Pasch. 1 Ann.

**A** Judgment was had in Aflise for the Office of Marshal, and a Scire facias brought thereupon; to which the Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy; the Plaintiff replied he was a Subject, born at such a Place in England; & hoc paratus, &c. and the Defendant demurred to the Plaintiff's Replication. (4.) 1 Salk. 2.

Holt C. J. The Plaintiff should have concluded to the Country, for where Alien Enemy is pleaded in Abatement, it is to be tried where the Writ is brought: But it is otherwise when pleaded in Bar, in which Case the Replication must conclude Et hoc paratus est verificare. He held, This could not be pleaded in Abatement to the Scire facias, because it was pleadable in Abatement to the Aflise: The Defendant shall not disable the Plaintiff from having Execution, since he admitted him able to have Judgment. 1 Vent. 210. Dyer 121. 1 Sid. 182. Cro. Eliz. 283.

Therefore Judgment Quod respondeat. Vide Additions.

## ACQUITTAL.

Johnson & Ux. *versus* Browning. Trin. 3 Ann.

**I**N Action of the Case, for maliciously Indising and Prosecuting the Wife for Felony in stealing certain Goods, whereof she was acquitted: The Declaration recited the Indisement, continent. materiam sequentem, and in the Recital of the Goods supposed to be stole, (1.) Mod. Cases 216. 5 Mod. 405.



stole, it was valoris so much, whereas the Indictment was Valentia of so much: And it was objected by the Defendant that this was a Variance; but being the same in Substance it was over-ruled; tho' if the Plaintiff had undertaken to set forth the Indictment in hæc verba, the Exception would have been fatal.

- 1 Sid. 15.
- Yelv. 46.
- 1 Lev. 53.
- 2 Keb. 546.
- 3 Lev. 210.
- 1 Vent. 12.
- 1 Mod. 4.

And by Holt C. J. The Plaintiff in this Action, to maintain it fully, ought to have proved a Copy of the Bill of Indictment, and that it was found upon the Oath or Procurement of the Defendant; but the Names of the Parties upon the Back of the Bill, is sufficient Evidence of their being sworn to it, tho' the Writing on the Back be no Part of the Record: And it may be proved, that the Defendant was a Witness without having the Bill. The first Part of the Defendant's Defence in this Case must be to prove a Felony committed, for without that it is impossible he could have a probable Cause of Prosecution; and here, because no Body was by at the Time when the supposed Felony was done but the Defendant's Wife, who could not in this Case be a Witness to prove it, the Chief Justice allow'd her Oath which she made at the Trial of the Indictment to be given in Evidence: And declar'd, that otherwise, a Person robb'd, &c. would be under an intolerable Mischief; for if he prosecuted for such Robbery, and the Party should at any Rate be acquitted, the Prosecutor might have an Action brought against him for a malicious Prosecution, without any Possibility of making a good Defence, tho' the Cause of his Prosecution were ever so pregnant and notorious.

Mod. Caf. 25.

If the Person prosecuted be entirely innocent of the Fact, yet if there be a probable Cause of Prosecution, Action for a malicious Prosecution will not lie; for it must be direct Malice, without any Colour of Cause, that will support an Action in this Case.

Holt C. J. said, A Son-in-Law indicted his Step-Mother for poisoning her Husband his Father; and she being acquitted brought an Action against him for a malicious Prosecution, and recovered Damages: And he, to requite her Kindness, brought an Appeal of Murder against her, whereon she was tried and convicted at the King's Bench Bar, and carried down and burnt in Berkshire, where the Crime was committed. Pigot's Case.

: Cro. 383.

And he remembered another Case very lately, where a Fellow brought an Action for saving of him, That he was a Highway-man; and it appearing upon Evidence that he

was so, he was taken in Court, committed to Prison, and convicted and hang'd the next Sessions of Gaol-Delivery.

So that People ought to be well advised before they bring such Actions. See Conspiracy.

## ACTION on the CASE.

Crosse *versus* Gardner. Mich. 1 W. & M.

**C**ASE. The Plaintiff declares, that the Defendant (1.) having Discourse of two Oren, did affirm them to be his own proper Oren; to which the Plaintiff <sup>143.</sup> <sup>Comb. 142.</sup> <sup>3 Mod. 261.</sup> <sup>1 Show. 68.</sup> fidem adhibens gave him so much for them, ubi revera they were the Oren of J. S. &c.

Holt C. J. Affirmation to support the Action ought to be at the Time of the Sale, and there it is an Inducement to buy. Dolben inclined, that the Action lay. The Case was argued again; and per Cur', the Action well lieth. 3 Cro. 44. Jones 196. 1 Roll. 91. Sciens omitted, and yet the Action lies. 1 Sid. 146.

Holt C. J. That Credit given on the Affirmation makes the Action lie.

Eyres agreed on the Case. Jones 196.

Judgment pro quer'.

Heblewait *versus* Palms. Mich. 1 W. & M.

**C**ASE for diverting a Water-Course; The Plaintiff declared, that the Defendant maliciously, &c. infregit a certain Mill-Dam, & perinde did divert the Water-Course ab antiquo & solito cursu erga the Corn-Mill of the Plaintiff, by reason whereof he lost the Profit of his said Mill; but did not set forth that the Water used to turn his Mill, or that he had any other Profit thereof, or that the Water-Course was antiquus aquæ cursus; &c. (2.) <sup>3 Lev. 133.</sup> <sup>8. C.</sup> <sup>3 Mod. 48.</sup> <sup>8. C.</sup> <sup>Carthew 84.</sup> <sup>85.</sup>

The Defendant pleaded Specially, that he is and was seized of such a Piece of Land, upon which the Dam was erected, and by which the Water had used to run to his own Mill, which was lately burnt down, by reason where-

of he had no manner of Use for the Water; and therefore he broke the Dam prout ei bene licuit.

There was a frivolous Replication and Rejoinder, and thereupon the Plaintiff demurred; but the Dispute was only concerning the Sufficiency of the Declaration, and the Bar.

It was argued in Support of the Judgment, that the Declaration was good upon the Possession alone, without any other Matter.

The Judgment was affirmed; but Holt C. J. said, that if the Cause had been tried before him, the Plaintiff should have proved his Mill to be an antient Mill, otherwise he should have been nonsuit.

*Wilkins versus Wilkins.* Mich. 1 W. & M.

(3.)  
1 Show. 71.

CASE: The Plaintiff declared that the Defendant had received divers Goods of the Plaintiff to trade withall, and to render an Account to the Plaintiff, and promised to render an Account. The Defendant pleads in Abatement, that he received them as Bailiff for the Plaintiff, and was to account for them, and prays Judgment, If compellable to answer this Bill. Demurrer, to prove that either the one or the other lies, 1 Inst. 172. Dyer 20. *Hawkins v. Park.* 1 Roll's Rep. 52. were cited.

C. J. Holt: The Inconvenience is the giving a long rambling Account in Evidence to the Jury; and there is no Case where a Man acts as a Bailiff, but he promises to render an Account. Dolben: An express Promise will make him chargeable. And afterwards by the whole Court the Plea was over-ruled, and Judgment for the Plaintiff.

*Pain versus Partridge & al'.* Trin. 3 W. & M.

(4.)  
Comb. 180,  
181.  
1 Show. 243,  
255.  
3 Mod. 289.  
1 Salk. 12.

IN Case: Plaintiff declared that the Town of Littleport was an antient Millage, by which there runs an antient River, over which was an antient Passage for Horses, &c. by a Ferry-Boat, kept by the Proprietors, who used to take such a Toll of all Passengers, &c. except of the Inhabitants of the antient Messuages in the said Mill, who used to pass Toll-free; and that the Defendants neglected to keep a Ferry-boat, whereby the Plaintiff was deprived of his Passage ad Dam', &c.



Defendants plead, that they, at their own Costs, built a Bridge, &c. which was an easier and safer Passage. Plaintiff replies, That he was not suffered to go over; Defendants demur.

Holt C. J. This is a good Custom, tho' the Contrary hath been held in another Action in the Common Pleas; it might have reasonable Commencement: And the Inhabitants might agree at first that one of them should have the Property of the Ferry, and the rest should be at the Charge of the King's Grant, and in Consideration thereof to be carried over Toll-free, which would be a good Commencement, &c. at this Day. 1 Roll. 552. The Plea in Bar is not good; for the Erecting of a Bridge is voluntary, and he may pull it down at his pleasure. But this Action lies not, because the Plaintiff hath no more special Damage, than others of the King's Subjects. 22 H. 6. 14.

The Chief Justice said, that Dolben Just. concurred with them in omnibus.

Judgment for the Defendant by Holt, Gregory and Eyres.

*Stockton versus Collison.* Mich. 3 W. & M.

A **S**umpfit brought by Commissioners pro opere & labore; in serving upon a Commission in a Cause depending in the Exchequer. (5.) Comb. 186. 1 Show. 330, 342.

By C. J. and Eyres (ceteris tacentibus) the Action lieth, and Judgment pro Quer.

*Dalston versus Janfon.* Mich. 7 W. 3. Intr. Pasch. 7 W. 3. Rot. 242.

A **S**umpfit on the Custom of the Realm, and Trover against a Carrier were joined in the same Declaration: Verdict for the Plaintiff, and entire Damages; Judgment was arrested. For the Assumpfit is ex quasi contractu, and a Contract and a Tort cannot be joined. Raym. 233. 2 Lev. 101. 1 Keb. 870. 1 Vent. 365. 1 Keb. 847. pl. 45. 2 Keb. 803. pl. 52. Br. Joinder in Action 10, 11. 3 Keb. 264, 276, 296, 302, 335. 3 Lev. 99. 1 Vent. 223. (6.) 1 Salk. 10.

*Knight versus Hopper.* Trin. 8 W. 3.

( 7. )  
Skin. 647.

**I**N an Action on the Case upon mutual Agreements, the Evidence was a Note in the Nature of a Bill of Parcels to this Purpose, Bought by Anne Knight of — Hopper 100 Pieces of Mullins, at 40 s. per Piece, to be fetched away by 10 Pieces at a Time, and paid for, as taken away. It was held by Holt C. J. at Nisi Prius, that the Pieces being marked and sealed, the Property is altered immediately, and that they remained only as a Security for the Money; Secondly, That if they are not taken away upon Request in a reasonable Time, the Party may have an Action for his Money, but may not sell the Goods.

*Roberts versus Savill.* Pasch. 9 W. 3.

( 8. )  
5 Mod. 394.  
Vide 2 Mod.  
306.  
6 Mod. 30,  
20, 137, 185,  
169.  
3 Mod. 405,  
&c.

**I**N the Common Pleas, in an Action on the Case, the Plaintiff declared that the Defendant did falsely and maliciously, &c. cause him to be indicted at the Sessions for a Riot: Upon which he appeared, and was acquitted; and also that the Defendant did falsely and maliciously cause him to be indicted another Time at the Sessions for a Riot, to which he appeared, and was acquitted. By Reason of which Prosecution, he lost his good Name, was at great Trouble and Expences, &c. to his Damage 100 l. The Defendant pleads Not guilty; and a Verdict for the Plaintiff, and 11 l. Damages.

On a Motion in the Common Pleas in Arrest of Judgment, the Question was whether the Action lay? And that Court was of Opinion that the Action did lie. And the same Question having been debated and argued here, the King's Bench was of the same Opinion; and Holt C. J. delivered this Doctrine. There are three Sorts of Damages to support Actions of this Nature. First, where a Man is injured in his Fame or Reputation, by Reason of which Injury, if the Words themselves do not bear an Action, the Loss or Damage that may ensue will. The second relates to his Person where he is assaulted or beaten, or put under any Confinement, whereby he is deprived of his Liberty; as appears by the Statute 3 Ed. 3. 33. But say Lord Coke in 2 Inst. 566. says truly, that the Statute was made in another Year, viz. 3 Ed. 3. 19. But neither

of these Sorts of Damages are the Foundation of this Case; for here his Reputation or Person are not damaged. There is a third Sort of Damages, which a Man may sustain in respect to his Property; and this is the Ground of the present Action; for that the Plaintiff was put to unnecessary Charges to answer this Indictment. And it is most plain he was put to unnecessary Expences; for that the Jury have found this Prosecution was false and malicious.

So that upon the whole, we all agree that the Judgment must be affirmed.

Lord Holt's Argument in the Book at large is worth reading with Attention, but is too long for this Collection.

*Turbervil versus Stamp.* Mich. 9 W. 3.

CASE on the Custom of the Realm, why he negligently kept his Fire in his Close, so that by the Flames the Plaintiff's Corn in a certain Close of the Plaintiff was burnt. After *Verdict pro Quer.* it was objected, the Custom extends only to Fire in his House or Curtilage, (like Goods of Cuckles) which are in his Power. Non alloc'. For the Fire in his Field is his Fire, as well as that in his House. Every Man must use his own, so as not to hurt another. But if a certain Storm had risen, which he could not stop, it was Matter of Evidence, and he should have shewed it. And Holt, Rokesby and Eyre (against the Opinion of Turton) gave Judgment for the Plaintiff.

N. B. 10 Ann. cap. 14. par. 1. No Action, Suit, or Process whatsoever shall be had, maintained, or prosecuted against any Person in whose House or Chamber any Fire shall accidentally begin, or any Recompence be made by such Person for any Damage suffered or occasioned thereby, any Law, Usage or Custom to the contrary notwithstanding.

Q. Whether the above Action would lie at this Day?

I is not within the Words: And perhaps not within the Reason of this Act of Parliament.

*Tyly & al. versus Morrice.* Pasch. 11 W. 3.

THE Defendant was a Common Carrier from London to Exeter, and the Plaintiffs by their Servant delivered

( 10. )  
Carthw  
485, 486.



livered to the Defendant's Book-keeper two Bags of Money sealed up, and told him that it was 200 l. and desired a Receipt for it; thereupon the Book-keeper gave a Receipt for his Master to this Effect;

*ff.* Received of, &c. two Bags of Money sealed up, said to contain 200 l. which I promise to deliver on such a Day at Exeter unto T. Davies, he to pay 10 s. *per Cent.* for Carriage and Risque.

The Carrier was robbed of this and other Money in the Night-time, but he paid 200 l. to Davies at Exeter. And now an Action was brought against him in common Form, upon the Custom of England, wherein the Plaintiffs declared, that on such a Day and Place they had delivered unto the Defendant 450 l. to be carried, &c. and at the Trial it was proved that there was 450 l. in those two Bags, at the Time they were delivered to the Carrier for 200 l.

The Question was, whether the Carrier should answer for the whole Money? It was the Opinion of the Chief Justice, that he should answer for no more than 200 l. because there was a particular Undertaking by the Carrier for the Carriage of 200 l. only, and his Reward was to extend no farther than that Sum, and 'tis the Reward which makes the Carrier answerable; and since the Plaintiffs had taken this Course to defraud the Carrier of his Reward, they had thereby barred themselves of the Remedy founded on the Reward.

So the Jury was directed to find for the Defendant, and found accordingly. The like Action by others against the same Defendant on the like Merits, and the like Verdict.

*Iveson versus Moore.* Trin. 11 W. 3.

(11.)  
1 Salk. 15,  
16.

**I**N Case, the Plaintiff set forth in his Declaration, that he was possessed of a Colliery, and there was a Highway near, by which he used to carry his Coals, and that he had a certain Quantity of Coals dug ready for Sale; that the Defendant dug a Colliery near his, and intending to draw away his Customers, and deprive him of the Profit of his Colliery, stopped up the Way so as Carts and Carriages could not come to the same, whereby he lost the Profits, and his Coals were spoiled for want of Buyers, to his Damage, &c. The Defendant pleaded non cul. and there was a Verdict for the Plaintiff; but Judgment was arrested.

Holt

Holt C. J. A Man cannot have a particular Action without a particular Injury or Right, which are the Grounds upon which all Actions are founded: This Plaintiff had neither a particular Right in this Way, nor a particular Injury, for the Stoppage of the Way is common to every one as well as to him; and it is not like a Case for Stoppage where a Person has a Way, Water-course or Common to his House, or Mill, and the Action is founded on a Right, which lies without the per quod, &c. The Chief Justice and Rokeby Just. held, that the Plaintiff's near Situation yielded him a Convenience, but no Right; for it is the King's Highway for the equal Use and Benefit of all his Subjects, and the Plaintiff has no more nor no better Right than any Body else: That supposing here was a particular Injury by Special Damage, that Special Damage is not well set forth, it not being sufficient to say, he lost his Customers, or that Buyers could not come, without shewing that Buyers were coming, and were hindered: And the Case in 1 Rol. 63. has been often denied to be Law, for the Damage must be specially shewn.

2 Saund. 115.  
3 Cro. 664.  
2 Lev. 214.  
233.  
1 Rol. 58.  
1 Cro. 140.

C. J. Holt cited the Case of Pain and Partridge, 2 W. & M. in Action of the Case for not keeping of a Ferry-Boat, which was for all the King's People, paying a Toll, but gratis for all the Inhabitants of such a Village, of which the Plaintiff was one: The Court in this Case adjudged the Custom to be good, but that the Action did not lie; for tho' the Plaintiff has a particular Right, yet that consists in being exempt from Toll, and not in Passing, which is common to all: So that the not keeping the Ferry is a publick Nuisance, for which the Plaintiff cannot maintain an Action more than any other Person. But the Defendant must be indicted.

1 Show. 243.  
Comberb.  
180.

Gould and Turton Justices, were of a different Opinion, and the Court being divided after a former Rule to stay Judgment, no Judgment could be entered.

In this Case it was agreed by the whole Court, That where an Action arises from a publick Nuisance, there must be a Special Damage; for he that did the Nuisance is punishable at the Suit of the Publick, by Indictment or Information; and to allow all private Persons their Actions without Special Damage, would create an infinite Multiplicity of Suits.

*Pitts versus Gaince and Foresight.* Pasch. 12 W. 3.

( 12. )  
1 Salk. 10, 11.

**T**HE Plaintiff declared that he was Master of a Ship, and that it was laden with Corn, in such a Harbour, ready to sail for Dantzick, and that the Defendant entered and seized the Ship, and detained her, by which he was hindered and obstructed in his Voyage. The Defendant justified for Toll and Port-Duties; but his Plea being naught, took Exception to the Action, That it should have been Trespass. Vide 4 E. 3. 24. Palm. 47. 13 H. 7. 26.

Br. Action  
sur le Case  
123.

All. 84.

Fitz. Action  
sur Case.

1 Roll Abr.

104.

2 Roll. Abr.  
556.

Lane 65, 66.

Cro. Jac. 265,

266.

Holt C. J. In the Cases cited the Plaintiff had a Property in the Thing taken, but here the Plaintiff has not a Property. The Ship was not the Master's, but the Owners. The Master only declares as a particular Officer, and can only recover for his particular Loss. Yet he might have brought Trespass, as a Bailiff of Goods may; and then he could only have declared upon his Possession, which is sufficient to maintain Trespass.

Judgment pro Quer'.

*Fetter versus Beale.* Trin. 13 W. 3. Intr. Pasch.  
10 W. 3.

( 13. )  
1 Salk. 11.

**I**N Assault, Battery, and Maihem, the Plaintiff declares that the Defendant beat his Head against the Ground, and that he brought an Action of Assault and Battery for that, and recovered; and that since that Recovery, by Reason of the same Battery, a Piece of his Skull was come out. The Defendant pleaded the Recovery mentioned in the Declaration in Bar; and avers it to be for the same Assault and Battery: The Plaintiff demurs. The Plaintiff's Counsel compared this to the Case of a Nuisance, where every new Dropping is a new Act. Holt C. J. contra; every new Dropping is a new Nuisance; but here is not a new Battery. And in Trespass, the Grievousness or Consequence of the Battery is not the Ground of the Action, but the Measure of the Damages; which the Jury must be supposed to have considered at the Trial.

Cro. Jac. 373.

Pl. 3. 555. 18.

15 Ed. 1. c.

24.

1 Salk. 10.

pl. 3.



*Coggs versus Bernard.* Trin. 2 Ann.

CASE; The Defendant Assumpsit to take up a Hogs- (14.)  
head of Brandy in a Cellar, and safely to lay it down <sup>1 Salk. 26.</sup>  
in another Cellar; and he so negligently laid and put it  
down in the other Cellar, that for want of Care the Cask  
was staved, and so much Brandy lost. It was objected  
in this Case, that there was no Consideration to maintain  
the Action; for the Defendant is not to have a Reward, and  
it does not appear that he is a common Carrier or Porter,  
to be intitled to any Reward; he is only to have his La-  
bour for his Pains, so that this is nudum pactum.

By Holt C. J. If the Agreement had been executory, as  
that he assumed to carry it, and did not, no Action would  
have lain; like the Case where a Man promised another to  
build him a House by such a Day, and did not, it was ad- <sup>11 H. 4. 33.</sup>  
judged that an Action lay not: But here the Defendant  
actually entered upon the Thing according to his Promise,  
and therefore he is liable to an Action for the Deceit put  
upon the Plaintiff who trusted him; for tho' he was not  
bound to enter on the Trust, yet if he does enter upon it,  
he must take care not to miscarry, at least by any Mismanage-  
ment of his own: It would be otherwise, if a Person had  
run upon the Defendant in the Street, and thrown down  
the Cask, or one had privately pierced it, because he had <sup>2 Cro. 667.</sup>  
no Reward. Tho' a Party has no Benefit, if he takes a <sup>3 H. 6. 26.</sup>  
Trust upon him, he is obliged to perform it. Judgment <sup>Owen 141.</sup>  
was given for the Plaintiff.

Vide Damages.

*Stanyon versus Davis.* Mich. 3 Ann.

ERROr of a Judgment in the Marshal's Court, wherein (15.)  
the Plaintiff declared that such a Day, in such a Pa- <sup>6 Mod. 223,</sup>  
rish in Com' Midd', he did deliver into the Stable of the <sup>&c.</sup>  
Defendant, (thus præd' D. com' Hospitat. ad tunc & ibidem  
existen. in stabulum deliberavit) a certain Gelding, to be by  
him safely kept at a reasonable Rate, and to be safely re-  
delivered by him to the Plaintiff; that the Defendant ad  
tunc & ibidem tam negligenter the said Gelding did keep, that  
through his Deceit it was taken out of his Inn, and so  
immoderately rid and whipped, that he was quite spoiled.

E

Acridia

Merchandise and Damages for the Plaintiff, and Judgment for him below: And now upon the Writ of Error Raymond and Cheshire at several Times excepted. See the Book at large.

Per tot Cur. The Judgment was affirmed, for the Neglect of not keeping according to the Contract, is the sole Gift of the Action. For if the Declaration had been, that the Defendant did so negligently keep the Horse, that he was taken out of the Stable, and rid into Somersetshire to his Damage, &c. the Action would lie; or that he so Negligently kept him, that through his Neglect he was beat or abused, or wanted reasonable Provender in his Inn. And the sole Cause of Action is his Neglect of due Care of him. Jud. affirm'.

Keeble *versus* Hickeringall. Pasch. 5 Ann.

(16.)  
3 Salk. 9.  
What Injury,  
tho' the Fact  
is done in a  
Man's own  
Ground, will  
maintain an  
Action.

This was a Special Action upon the Case, and a Merchandise for the Plaintiff. And the Case was, that the Defendant was Lord of a Manor, and had a Decoy; the Plaintiff had also made a Decoy upon his own Ground, which was next adjoining to the Defendant's Ground, and pretty near also to the Defendant's Decoy; and therein the Plaintiff had decoy and other Ducks, whereof he made a considerable Profit; and declares that the Defendant maliciously and fraudulently intending to take away from the Plaintiff the Benefit and the yearly Profit which he made of his said Decoy, &c. did with his Gun come to the Head of his Pond, and there did several times shoot, thereby frightening away the Plaintiff's Ducks from his Decoy, by means whereof the said Ducks were frightened away, &c. ad damn', &c. And

Serjeant Darnel for the Defendant argued, and moved two Points in Arrest.

First, What Right or Property the Plaintiff had in the Ducks.

Secondly, Admitting that he had a Right, whether any Injury was done him.

First, He said that a Lord of a Manor may shoot Game any where within his Manor, upon any Man's Freehold in the Manor; which both Holt and Powel denied, unless he had some other Special Privilege, and would not suffer him to insist upon the Point then.

Darnel said, The Plaintiff had no Property possessory in these Ducks, for that must be *ratione loci & impotentia*, 7 C. 17. b. As if there be a Nest full of young Fowl (before they can fly) in his Ground, Transgr' lies, transgr' quare pisces suos cepit in separali piscaria. Jones 440. 1 Cro. 553. March 48. Because *ratione loci & impotentia* he hath in them a possessory Property, vide 1 Vent. 122, 123. where the Difference is taken.

And Hall said, Any Intendment shall be admitted to make good a Verdict, tho' the three other Justices there held it good upon Demurrer; but the Case of Mallock and Estly is for me, 3 Lev. 227. there is a Writ in the Register, 93. b. *Quare clausum fregit*, & 200 cuniculos suos pret' 300 solidorum cepit & asportavit, but this must be wrong by F. N. B. 87. & 7 C. 17. b. is expressly in Point; so is 3 Lev. 227. within the Reason; so is F. N. B. 86. m. but the Register 96. b. makes the Difference plain where there is a possessory Property; as young Hawks there is suos, and Rabbits in a Warren; but wherein there is no Property *ratione loci & impotentia*, there suos is omitted, as in Hares, Rabbits, Pheasants and Partridges.

As to the second Point, Admitting the Plaintiff had a Property possessory, yet he is not intitled to this Action, for if the Defendant was a Tort-feasor, then Trespass lies, and not a Special Action on the Case; or, as I said, the Plaintiff has but a Right of taking them upon his own Ground, and the Defendant may certainly shoot them upon his own Ground: And it is not said that the Defendant came on the Plaintiff's Ground to shoot; nor is it found that he did; therefore it shall be intended that he shot upon his own Ground; and it is not found that he shot at the Defendant's Ducks, and it is of common Right for every Man to shoot on his own Ground, and even at this Day every Freeholder qualified may do it, and the Defendant is so qualified.

Broderick for the Plaintiff said, that it may very well be intended by the Verdict, that the Defendant did shoot upon the Plaintiff's Ground.

Holt and Powell contra; for we will not intend a substantial Trespass with which the Defendant is not charged. *Cuniculos suos* was held good in this Court, Mich. 9 W. 3. between Sutton and Moody; so is Kelw. 203. a. b. And therefore a Man has a Property possessory *ratione loci* only; but here in our Case we have a Profit by our Decoy, and you are charged that you maliciously, &c. to destroy the same, shoot



shoot off Guns at the Head of the Pond to frighten away my Ducks, and that you did frighten them so, as that you have taken away the Benefit and Advantage that I might make thereof: Surely this is actionable, if you shoot off your Guns with such Intent; and it is so found by the Alerd; here is *damnum & injuria*, and you must pay for the same, otherwise the Law will be very defective. There has been a stronger Case than this maintained by an Inn-keeper, who alledged that he got his Livelyhood by the Northern Carriers, and that the Defendant maliciously, to take away his Customers, had set up an Inn near the Plaintiff's, and that he used to go every Day to Highgate, and then and there spoke to the Northern Carriers, and told them he would entertain their Horses at a Penny a Night cheaper, if they did frequent his House, than any other; by means whereof the said Northern Carriers left the Plaintiff's House, *ad damn'*, &c. and this was held actionable.

Holt C. J. That Case is not Law, for 'tis what is frequently done; go into Pater-noster-row, and you will see it done every Day, and the Defendant in that Case did nothing but what was lawful for him to do. But as to the Case at Bar, without Question the Plaintiff has a Property in the Ducks whilst they continue in his Pond or Decoy; and if the Defendant puts them away, that can't be lawful, nor should the Defendant disturb the Plaintiff in taking of the Profits of his Decoy; so as neither of them did hinder, or did real Damage to the other. The Owner of the Land is to have the Pickage and Stallage, the same not belonging to the Franchise, but to the Owner; and here if the Ducks fly out of the Plaintiff's Ground into the Defendant's, then the Defendant may shoot them; and so 11 & 12 H. 8. 10. a. b.

Powel said, his Brother Darnel did divide this Case into the right Points; and certainly the Law is, if I have a Park or Warren, and I bring an Action, I shall not say *cuniculos suos* or *damas suas*, for that a Park or Warren may be only a Liberty or Privilege; but if I am Owner of the Soil of such Park or Warren, &c. or you take them out of my Close, there I shall say *cuniculos suos*; and so the Register 93. b. and 96. b. are both right. If I spring a Bird on my own Ground, and let my Hawks fly at him, and this Bird is chased over your Ground, and you shoot him on the Wing, I shall have him because of my original Property. If I have a Dove-Cote, and you shoot to banish away my Pigeons, tho' on your own Ground, I think

it not lawful; and I think a Decoy is much the same thing: But if you shoot at a Flight of Birds on your own Ground, tho' near my Decoy, 'tis lawful.

Gold remembered such a Case in Somersetshire, but it was never debated. This is to be argued again, being a new Case.

Keeble *versus* Hickeringall. Hill. 5 Ann.

**D**Eclaration being, that he was possessed of a certain Close, and in that Close he had a Vivarium, anglice a Decoy, and that during his Term he made Profit of it, and that divers flumineæ volucres, anglice Wild-fowl, adveniebant & frequentabant vivarium præd', and the Defendant in his own Close came so near to the Head of the Vivarium, and shot off his Gun malitiose & supra, and so often there, that he frightned the Wild-fowl from the said Decoy, by which the Plaintiff lost the Profit thereof for four Months, &c. (17.)

Sir James Montague moved in Arrest, that the Declaration was not good.

First, Because vivarium signifies a Pond, or Park; and tho' it signifies a Pond, yet it cannot by any Anglice be made to signify a Decoy-Pond.

Secondly, Flumineæ volucres signifies River-fowl, and cannot be said by any means to signify Wild-fowl.

Thirdly, Frequentabant & adveniebant, &c. but does not say that they settled, so as to give the Plaintiff a Property.

Fourthly, He says that he lost proficuum vivarii præd' for four Months, ad damn' 20 l. tho' it does not appear that any such Profit can arise from a Vivarium, which only signifies a Pond here; then he said the Action it self doth not lie.

First, Because it is not founded either on any Injury or Damage, for he insists upon having a Right to have Fowl coming there; which is absurd.

Secondly, If any Damage be, 'tis only consequential and presumptive; for who can assure us that any Wild-fowl would come there.

Thirdly, Decoys are not of any long Standing, but against the Laws of the Land, to allure Fowl and take them there in such large Quantities; and the Plaintiff can only have a Property in such Wild-fowl as he has taken; perhaps he has a Right to hinder others from coming to

take Fowl there : But I do not find that he has any Right not to be disturbed in his Decoy. No Subject has any Right to any thing that is *feræ naturæ*, till he has it in his Power; as Fish in a Pond, or Deer in a Park, or Cony in a Warren, because then they are *quodammodo* in his Power; but when they leave their Inclosure the Property ceases; so that Creatures of the Wing, which have a Liberty to go and come, cannot be said to be in any one's Power. There are three Ways of gaining a Property in Creatures *feræ naturæ*, 2. Lib. Bracton, fo. 1. b. *De acquirendo rerum dominio, ratione loci & impotentia, vel infirmitatis, & privilegii*; as if I have young Birds in their Nest, vide March 49. but 7 C. 17. b. there *loci & impotentia* are both necessary to give a Property; no Action will lie for Chasing only, &c.

Raymond for the Plaintiff: Our Declaration is good enough; and it is no Matter if it be a little Informal, which answers all the Objections as to the Form; and here the Damage is certain enough, tho' it is not said how many Ducks were frightened away, as Crover will lie for a Library of Books: Here we say the Ducks were frightened, and we lost the Profits, which is certain enough. We hope that the Court does know what a Decoy is; tho' when Bracton wrote, it was not known; for we have the same Property in Ducks in our Decoy, as in Fish in our Stew, or Conies in a Warren. 1 Cr. 553. March 48. If Case will lie for him against a Stranger for taking his Ducks, *pari ratione* he shall have an Action against a Stranger for hindering him to take the Profits of his Decoy. As to what is said, that the Damage is consequential and after the Fact, I take it that will be well enough, because the Jury, I suppose, had Evidence as to that upon the Trial, or they would not have found it.

Mountague said, That the *frequentabant & adveniebant* was not answered.

Raymond: It is well enough, being only an Inducement, not the Gift of the Act.

Holt C. J. He has a Right to the Fowl whilst they are on his Ground. If a Man starts a Hare in my Ground, and kills it there, I have the Property therein; but if he chases him out of my Ground into another's, my Property ceases when he left my Ground, and is in him who killed him, vide 12 H. I think that *feræ volucres* had been better than *flumineæ volucres*. And tho' Decoys spoil Gentlemens Game, yet they are not unlawful, for they bring Money



into the Country. Dove-Cotes are lawful to keep Pigeons.

Powel: The Declaration is not good; but this being a Special Action on the Case, it is helped by *Verdict*; if you frighten Pigeons from my Dove-Cote, is not that actionable?

Montague: Yes; for they have *animum revertendi*, and therefore you have a Property.

Powel: If a Gentleman starts a Hare in my Ground, and kills him there, it would be hard to charge him in an Action for it. If a Man doth erect a Weir upon a River to catch Fish on his own Ground, and hinders them from coming to my Part of the River, that is unlawful.

Holt C. J. I cannot see why a Man may not well justify doing it on his own Soil. *Adjournatur*.

Keeble *versus* Hickeringall. Hill. 5 Ann.

HOLT C. J. delivered the Opinion of the Court for the Plaintiff, and said, that this is a new Action, but is supported by the old Reason and Principles of Law; taking of Wild-Fowl is a lawful and profitable Employment, it is as if it were his Trade used upon his own Ground, and surely it is lawful for a Man to make the best Advantage he can of his own Ground; and there is the same Reason for him to have this Action, as for any Tradesman for being damnified in his Trade; and that is the Reason why Words, that are in themselves not actionable, will bear an Action when they damnify a Man in his Trade. As to say of a Merchant, he is a Bankrupt, there is damn' sine injuria; or if one sets up the same Trade with another, there is a Damage to the other, but no Injury, for it is lawful for him so to do, for which no Action lies. So if a Man keeps a School, and another sets up by him, that is not actionable; yet if he terrifies the Scholars of the other by shooting of Guns, that is actionable. If a Man has a Fair or Market, and another hinders a third Person from bringing a Horse thither to be sold, for which a Toll or other Duty was to be paid, tho' possibly the Horse might not be sold there, this is actionable. 29 E. 3. 18. b. Case lies for frightening away my Tenants at Will. 9 H. 7. 8. Rastal 662. pl. 9. For using of Cheats only, this is not like *Plaiter's Case*, 5 C. 34. b. for this Action is not brought for his Property, but is brought for hindering him to take his Profit, and from  
( 18. )

exercising his Trade, and is like the Case for hindering his Servant to collect the Toll. *Inter Dent and Oliver*, 2 Cr. 122, 123. Yet he did not say there what Toll he was to collect. So is *Owen* 109. For the Disturbance there and here is the Cause of Action, and it is the most usual and the best way of declaring. 2 Cr. 604. and 9 C. *Earl of Salop's Case* 'twas said, that the Word *Wild-Fowl* was uncertain, but I think it is so certain, that there is an Act of Parliament takes Notice of it, viz. Stat. 25 H. 8. cap. 11. which forbids any, under a Penalty, to take *Wild-Fowl* between the Months of May and August; and if *Wild-Fowl* was not known, there would be no Penalty for it. It is true, by Stat. 3, 4 E. 6. cap. 7. the Penalty is taken away, yet the rest of that Statute stands; and it is still Penal to take away the Eggs of *Wild-Fowl*; and all such Fowl that use the Water and are wild, are also *Wild-Fowl*: And the Word *fluminea volucres* is the most proper Word, and so used in the Dictionary. *Vivarium* is said in 2 Inst. 100. to be a Place in Land or Water, wherein living Things are kept; and so here with an Anglice is very proper for a Decoy-Pond.

Holt C. J. In some Cases you cannot set up a Franchise, tho' you have Letters Patents for it; as if I have a Ferry, I will bring an Action against you for setting up another, for that I am obliged to keep up mine for the good of the Publick, which would be hard upon me if you got all the Profit. But otherwise it is where the Publick is not concerned. Judgment for the Plaintiff.

### *Spearman versus Moreland.* Trin. 5 Ann.

(19.)  
An *Indebitatus assumpsit*  
by a Prothonotary against an Attorney lies.

**E**rror of a Judgment in Durham. The Case was, That the Defendant, who is a Prothonotary in that Bishoprick, brought an *Indebitatus* against the Plaintiff for Fees, for Work done by him at several Times for the Plaintiff in Error, who was an Attorney, and declares for Work done by him for him as Attorney; and the Prothonotary had Judgment below, on which Error was brought; and the sole Question was, whether an Attorney that comes to a Prothonotary, or other Officer of the Courts, and prays them to do several Things at several Times, shall be charged for such Officers Fees in an *Indebitatus assumpsit*, or only charged upon a Special Promise, in Regard that such Prothonotary or other Officer may also charge the several

veral Clients of the Attorney, for whose Use in truth such Work is done. And

Broderick for the Plaintiff in Error said, that this should be an Action upon the Special Promise, and no Indebitatus, there being no Duty precedent; and for this cited the Case of Sands and Trevilian, 1 Cr. 107, 193. which he said was stronger than the Case in Question, for there an Attorney brought Debt against him that retained him, but the Retainer being for another, adjudged the Action did not lie: So here the Work, which the Prothonotary did for us, was for others, against whom the Prothonotary may bring his Actions; so that our Promise is Special, and so we should be charged, there being no quid pro quo; and so concluded that the Judgment should be reversed. But it was answered by Letchmore, and agreed by the Court, that the Action well lies, and differs from the Case of Sands and Trevilian, because this Action is upon an express Promise, and the other is of Retainer, and there was none indebted to the Prothonotary, but the Attorney, for he has nothing to do with the Client.

Holt C. J. said, This Case also differed from the Case of a Servant put in Dyer 230. pl. 56. where he buys Goods for his Master, and obliges himself to pay, yet having bought the Goods for his Master, his Promise of Payment is collateral. But here the Attorney is the principal Debtor, for the Prothonotary has no Action against the Client. As if I desire a Draper to give so much Cloth to B. now am I the principal Debtor. Suppose a Country Attorney sends up to Town for Writs to an Attorney here, must the Attorney in this Town look for the Country Attorney's Clients in the Country? That would be unreasonable; therefore the Indebitatus well lies in this Case; to which the Court agreed. Then

Broderick moved to quash the Writ of Error, because the Declaration was by Bill, and the Writ of Error says, it was by Original; for which the Court did quash the Writ of Error. The Court said in this Case, that if I promise to pay Interest for Money, no Indebitatus lies for the same, but a Special Action on the Case lies; *ex relatione* M<sup>r</sup>i. Newman.



—versus Slater. Trin. 7 Ann.

(20.)

**A**N ACTION on the Case for causing the Plaintiff to be arrested, and falsely and maliciously charging her with a Felony before a Justice of the Peace, and causing her to be committed to Bridewell, and put to hard Labour; a Verdict for the Plaintiff, and intire Damages.

Moved in Arrest of Judgment, because it ought to be an ACTION of Trespas, and not Case.

Contra, the ACTION is well founded; for we do not complain of a bare Trespas, but for some special Damages suffered by the Arrest and Imprisonment, which are not the Consequences of every Arrest and putting in Prison.

The Stopping of a Water-course is Trespas; but if it is set forth that the Ground was spoiled, it is Case. The Pulling of Tiles from a House is Trespas; but if by Reason thereof the Timber is rotted by the Rain, an ACTION upon the Case will lye. 1 Roll. Abr. 104. K. pl. 3.

There are several Cases where the Party grieved hath his Election, either to bring Trespas, or an ACTION on the Case. 4 Co. Slade's Case, 2 H. 7. 11. 9 Ed. 4. 43. 2 Cro. 255. 1 Roll. Ab. 105. F. N. B. 106. 93. And here in this Case there was no Warrant, as in that of F. N. B.

The Difference between an ACTION of Trespas and Case is, that an ACTION of Trespas lies where there is an immediate Grievance, and Case where a mediate Injury. This ACTION is not brought against the Constable, but the Person that caused the Plaintiff to be arrested.

Mr. Eyre contra: The Matter laid in the Declaration, shews this to be but a bare Trespas. It is not in a Man's Power, by giving it the Term of an ACTION upon the Case, to maintain the ACTION when it is a Trespas.

It doth not appear, as it is in the Declaration, that the Person, before whom the Complaint was made, was a Justice of Peace; or that it was a Matter within his Jurisdiction.

Where a Man arrests another by Command, without any Warrant, it is a Trespas; and that he that commands is a Trespasser.

Tonson vers. Olton, 5 W. & M. C. B. There it was held to be a Trespas; and that putting in the Per quod to make it an ACTION upon the Case, was not allowable. 2 Roll. Rep. 139. 13 H. 7. 2.

Holt C. J. It doth not set forth that he arrested her by his own Authority, neither doth it appear to be a false Imprisonment, and therefore it is not an Action of Trespass, but an Action upon the Case.

Per Curiam, Judgment for the Plaintiff.

*Sleake and Rawlins. Mich. 7 Ann.*

**A**N Action upon the Case for arresting the Plaintiff in an extravagant Debt, with Intent to keep him in Prison, by deterring his Neighbours from being his Bail. ( 21. )  
After Verdict for the Plaintiff, Mr. Deane moved in Arrest of Judgment ;

First, It is not laid in the Declaration to be malicious. Secondly, It is not found by the Jury to be an extravagant Sum, but that the Defendant had not Cause of Action.

Raymond contra : 1 Sand. 228. is the same Case as this, it is laid sine aliqua causa, as here, and held good. 3 Lev. 210. there it is sine rationabili Causa. It is laid ea intentione that he might not get Bail, which doth tantamount malicious.

If we admit that the Defendant had Cause of Action against the Plaintiff, but that he brought it for a greater Sum, with a malicious Intent to deter his Neighbours from being his Bail, yet this Action will lie.

Holt C. J. But in this Case the Declaration must be Special.

Powell J. If the Defendant had demurred, it had been something; but now it is after a Verdict, and therefore the Plaintiff must have Judgment.

Per Curiam, Judgment for the Plaintiff, Nisi.

*Harrington versus Bush.*

**A**N Action of Trespass for driving and impounding Sheep. The Defendant pleads that A. was possessed of the Close where, &c. for a Term not expired; and A. being so possessed, and the Sheep in the Close doing Damage, he, by the Command of A. and as his Servant, drove them out and impounded them. To this the Plaintiff demurred; and shewed for Cause, that there is no Title set forth. To justify this Demurrer were cited for the Plaintiff Yelv. 74. 2 Cro. 291. Moor 847. ( 22. )

Holt

Holt C. J. Here the Title cannot come in Question ; for if it had been brought to try the Title, he should have brought it for coming on the Land, and taking away his Cattle.

Per Curiam, Judgment for the Defendant.

Loveridge *versus* Hopkins. Mich. 8 Ann.

( 23. )

**A**N Action upon the Case, wherein the Plaintiff declares, that he was possessed of a Farm whereof two Closes were Parcel ; and of a River running near those Closes ; and that the Defendant did at S. in a certain Meadow there, dig duo fossata, by which the Water into the Ditches did run, so that pro diversis diebus he lost the Benefit of it for his Cattle. Upon Not guilty pleaded, there was a Verdict for the Plaintiff.

Serjeant Pratt moved in Arrest of Judgment, that he ought to have brought Trespass, and not an Action upon the Case ; for the Converting of the Water is Trespass.

It is like a Case that was in the C. B. where, in an Action upon the Case, the Plaintiff declared that he was possessed of a Manor, and of a certain River de solo & aqua, and that the Defendant fished there, which was a Trespass. So here, in as much as the Plaintiff intitles himself to the River, it is a Trespass in its Nature.

Holt C. J. The Diversion must be in the Plaintiff's own Land to make it a Trespass.

Pengelly on the same Side : They lay a Continuance of a Loss, and do not shew that they had any Loss.

Powel J. It may be better, than if it laid with a Continuando ; they have alledged that pro diversis diebus they lost the Benefit of the Water. By doing a Trespass one Day, a Man may have a continual Damage, tho' there is not a Continuance of a Trespass.

Per Curiam, Judgment for the Defendant.



# ACTION *fur* ASSUMPSIT.

Martin *versus* Sirwell. Pasch. 2 W. & M.

**I**Ndebitatus Assumpsit for 5 l. received to the Plaintiff's Use. ( 1. )  
1 Show. 156.

One Barksdale made a Policy of Assurance upon Account for 5 l. premium in the Plaintiff's Name, and paid the premium to the Defendant, and that Barksdale had Goods then on Board, and so the Policy was void, and the Money to be returned, by the Custom of Merchants.

Holt C. J. mentioned a Case adjudged by Wadham Wyndam, of Money deposited upon a Wager concerning a Race; that the Party winning the Race might bring an Indebitatus for Money received to his Use; for now by this subsequent Matter, it is become as such. And as to our Case, the Money is not only to be returned by the Custom, but the Policy is made originally void, the Party for whose Use it was made having no Goods on Board, so that the Money was received without any Consideration, and consequently originally received to the Plaintiff's Use.

Judgment for the Plaintiff.

Francam *and* Foster. Mich. 4 W. & M.

**B**Efore Holt C. J. The Plaintiff declared upon a Promise made by the Defendant, that if the Plaintiff would endeavour to procure a Marriage between the Defendant and A. S. that the Defendant would give him Fifty Guineas; and the Evidence was, that if the Plaintiff should procure the Marriage: And ruled, that this Evidence does not maintain the Declaration; for by the Declaration the Plaintiff would be intitled to the Fifty Guineas if he endeavoured, tho' another effected the Marriage: But by the Evidence, no Money ought to be paid except the Marriage was effected; but inasmuch that he declared also in an Indebitatus assumpsit pro Cura & Labore of the Plaintiff circa negotia of the Defendant; this was held sufficient to support the Action. ( 2. )  
Skinner 326.

Holt C. J. said, If a Man agrees to pay such a Sum at three several Days, here he may not declare for the

H

Sum

Sum till the Days are past ; but then a general Indebitatus assumpsit lies. And here it was objected, that the Promise was not to be performed within a Twelvemonth, and so void by the Statute of Frauds and Perjuries ; non allocatur.

For Holt C. J. said, That tho' the Promise depends upon a Contingent, which may not happen in a long Time ; yet if the Contingent happen within a Year, the Action is not within the Statute.

Masters *and* Marriot. Pasch. 5 W. & M.

( 3. )  
Skinner 347.

**T**HE Plaintiff declares upon a Colloquium de & concernen' a Horse of the Defendant, and that the Defendant bargained and sold the Horse to the Plaintiff for Eight Guineas, and quod tempore bargainizationis agreeat' fuit, that if the Plaintiff putaret & existimaret the said Horse not to be worth Eight Guineas, then if the Plaintiff deliver the said Horse to R. B. to the Use of the Defendant, that the said R. B. shall pay the Plaintiff Eight Guineas ; and if the said R. B. did not pay, then the Defendant would pay upon Demand. The Plaintiff says, he did not esteem the Horse to be worth Eight Guineas, and delivered the Horse to R. B. to the Use of the Defendant, and that the said R. B. had not paid, &c. And Non assumpsit pleaded, and Verdict and Judgment for the Plaintiff in C. B. Error was brought, and Error assigned that the Plaintiff alledged that R. B. did not pay, and does not say that he demanded the Eight Guineas of the Defendant, and that he did not pay : For the Agreement is intire, and Payment by R. B. or the Defendant good ; and tho' R. B. has not paid, the Defendant forsitán has paid. Also he does not alledge a Request ; and the Payment is to be made upon Request ; and so the Request is Part of the Agreement, and ought to be specially alledged, & sæpius requirit' not sufficient. The Court affirmed the Judgment.

Holt C. J. said, that it was an intire Contract, and by the Re-delivery of the Horse the Eight Guineas became a Duty, and being a Duty precedent, a Demand was not necessary.

Fielding *versus* Serrat. Trin. 8 W. 3.

CASE against the Drawer of two Bills of Exchange. (4.)  
 The Defendant pleads, that in the Year 1689 the Comb. 375.  
 Plaintiff levied a Plaint against him in the Portmote Court 376.  
 of Chester, and declared thereupon, that the Defendant promised to pay to Sarah Dod, or her Order, &c. if Kent and Collard (upon whom the Bills were drawn) did not pay them, and that Sarah Dod ordered them to be paid to the Plaintiff; and that there was a Verdict and Judgment in the Portmote Court for the Defendant; and he avers them to be the same Bills, and same Cause of Action, &c. The Plaintiff Demurs. Acherly for him urged, that none but Sarah Dod, or her Executors, could bring the Action upon the Promise laid in the Declaration below; but this Declaration is of another Nature, upon an implicit Promise to the Plaintiff. He cited Raym. 472. Put and Hardy *versus* Sir William Rastern and others, that a Judgment for the Defendant in Trespass was not pleadable in Bar to an Action of Trover for the same Goods.

Holt C. J. That Case must not stand for Law; Saunders and I argued that Case, and he agreed to me the Law was otherwise, and it was ruled otherwise in C. B. afterwards.

Sir William Williams, pro Defendente, said, tho' the Judgment might be avoided by Error, yet the Bills being averred to be the same, &c. it is pleadable whilst in Force.

Holt C. J. It doth not appear upon Record that the Action below was upon the Bills; the Law raiseth two several Promises upon the two Bills, but you declare below upon a Joint Promise to pay tam the one, quam the other, (if Kent and Collard did not pay them;) which could not be maintained without an express Promise.

Williams: The Foundation of the Promise below was several, so the Law will divide it.

Holt C. J. Promise in Law is a Word used; but I hold the Drawer makes an express Promise, by giving the Bill. Sure a Man might have really made such a Promise as is laid below jointly, and if he could prove no more than the two Bills, there he must needs fail. Moreover, the Plaintiff could not bring such an Action below upon the Promise to Sarah Dod. Indeed one may have an Action on the Case



Case upon a Bill of Exchange, without a Promise; but when such a Promise is laid, it is material.

Judgment *pro Quer*.

Thorpe *versus* Thorpe. Hill. 8 W. 3. Rot. 1667.

(5.)  
1 Lutw. 245.  
1 Salk. 171.

**T**HE Plaintiff declares upon mutual Promises, upon an Agreement, by which the Plaintiff agreed to Release to the Defendant his Equity of Redemption in two Closets, in Consideration of which, the Defendant promised to pay to the Plaintiff 7 l. and then he avers generally, that he performed all on his Part; and says that the Defendant, in Pursuance of the said Agreement, paid him 25 s. Part of the said 7 l. and declares for 5 l. 15 s. for a Release of his Equity of Redemption.

The Defendant to each of the Counts pleads a Release in Bar, made after both the Promises, by which the Plaintiff released to the Defendant, &c. all Debts, Duties, Reckonings and Demands whatsoever.

The Plaintiff prays Oyer of the Release, and it appears to be the Release of the Equity of Redemption, with a great many general Words thrown in towards the latter End, viz. All and all manner of Actions, Suits, Causes and Accounts, Debts, Duties, Reckonings, Sum and Sums of Money, and Demands whatsoever, which he the said *John Thorpe* ever had, or in Time to come can or may have, &c.

Demurrer, and Joinder in Demurrer.

The Objection that was made in this Case was, That by the Release this Action was released. But to that it was answered by the Plaintiff's Counsel, that the Release was a Consideration preceding the Promise, and the Ground and Foundation of the Action; and till that was made, the Plaintiff had no Cause of Action vested in him; and because also it could not be the Intent of the Parties, that the Release should be a Discharge of the Duty which was to be created by it. And for that the Case of *Potter and Philips* (Palmer 218. 2 Cro. 627.) was cited, where the Defendant in Consideration that the Plaintiff would allow to the Defendant the Rent due to him on a Demise, and would make to him a Letter of Attorney to sue a Bond made to the Plaintiff, and that he would release to the Defendant all Actions and Demands, the Defendant promised the Plaintiff, that if he did not receive the said Debt that he would pay it to the Plaintiff; and then he avers

*par*.

particularly the Performance of his Part, &c. After Verdict for the Plaintiff, on Non assumpsit pleaded, it was moved in Arrest of Judgment, that by the Release the Promise was discharged; but it was resolved to the Contrary; quia per Cur<sup>iam</sup>, the Release it self is Part of the Consideration which induces the Promise, and the Intent of the Parties cannot be to extinguish their mutual Contract. Also the Promise is to do a future Act, which cannot be released by a Release of all Actions or Demands. But by Houghton, a Release of all Promises may be a Release presently; Hoe's Case, Co. 5. and other Cases were cited to the same Purpose. Vide Roll. 2. Abr. 407. Numb. 22. Smith and Stafford's Case, Hob. 216. 2 Cro. 57. Clarke versus Thompson. And of this Opinion was the whole Court; and the Plaintiff had Judgment. Lutwyche for the Plaintiff.

But a Writ of Error was brought in B. R. which Intra Pasch. 12 W. 3. Rot. 253. in which Chief Justice Holt, after several Arguments, delivered the Resolution of the Court to this Effect:

We are all of Opinion that the Judgment given in C. B. ought to be affirmed; for we hold that the Defendant's Promise is not released. It was urged at the Bar, that if the Plaintiff might have an Action on the Defendant's Promise before the making of the Release, that then the Release will be a Bar to the Plaintiff: And I agree the Consequence, if it should be so. But in this Case the Plaintiff could not have an Action before the Release made; for the Release of the Equity of Redemption is that which intitles the Plaintiff to his Action for the 7*l*. A Release of all Demands will not release a Covenant not broken. And so in 2 Cro. 170. Hancock and Field's Case, and 5 Co. 70. Hoe's Case.

It was urged, to prove that the Plaintiff might have an Action before making the Release, that there are mutual Promises; and in that Case there is no need to alledge Performance on the Plaintiff's Part. That is generally true, but then it depends on the Words of the Agreement, whether it shall be so or not: And certainly one may make the Agreement so, that one shall not be obliged to part with his Money till he hath a Consideration for it.

In this Case, the Agreement is, that the Plaintiff shall release the Equity of Redemption, in Consideration whereof the Defendant is to pay 7*l*. So that the making the Release is a Condition precedent to the Payment of the Money.

The Books differ in this Point, and therefore it is necessary that it should be settled.

I agree the Case of Nichols and Rainbred, Hob. 88. to be good Law : There in Consideration that Nichols promised to deliver to the Defendant a Cow, the Defendant promised to deliver to him 50 s. it was adjudged that the Plaintiff need not aver the Delivery of the Cow, because there was Promise for Promise.

15 H. 7. 10. b. is full in Point on the Difference which I have taken on the Words of the Agreement. One covenants to serve me for a Year, and I covenant to give him 20 l. he may sue me for the 20 l. although he doth not serve me : But it would be otherwise if the Agreement be, that he should have 20 l. for to serve me a Year. Vide *ibid.* another Case on the same Difference.

There is no Reason that one should be compelled to pay Money for the Performance of an Act, before that the Act be done. But here the following Differences are to be noted.

First, If by the Agreement a certain Day shall be appointed for Payment of the Money, and this Day is to happen before that the Act can be performed for which the Money is to be paid, there, altho' the Words be that one shall pay so much for the Performance of such an Act by the other, yet the Party may have an Action for the Money after the Day appointed for Payment thereof, and before that Act be done. On this Reason is the Judgment in the Case of Sir Ralph Pool and Sir Richard Tolchester, 48 E. 3. 2, 3. cited in Ughtred's Case, 7 Co. 10. b. where it is briefly put; one covenants to serve the other in the Wars of France with three Esquires, and the other covenants for it to pay 42 Marks; an Action lies before the Service performed. But in the Case at large, as it is put in the said Book of 48 E. 3. the Agreement was, that the Society of the Money should be paid in England before the Service in France, and therefore it warrants the Difference that I have taken. So in Large and Cheshire's Case, 1 Ventr. 147. one promises, in Consideration that the other would permit him to enjoy such Lands for seven Years, that he would pay him 20 l. pro quolibet Anno; an Action lies after each Year. On the same Reason is the Case of Pordage and Cole, 1 Saund. 319. where it was agreed that Cole should give to Pordage 500 l. for all his Land, the Money to be paid a Week after Midsummer; and adjudged that an Action lies for the Money before the Land is conveyed.



Another Difference to be observed is, that if a certain Day should be appointed by the Agreement, yet if that Day happens after that the Consideration is to be performed, there ought to be an Averment that the Service is performed. Dyer 76. If a Contract be made between two, that for the Hawk of one to be delivered at such a Day, the other shall have his Horse at Christmas; if the Hawk be not delivered at the Day, the other shall not have an Action for the Horse.

The Case of Russel and Ward, 1 Jones 218. is intricately reported; but if it be well considered, it will prove this Difference; and so will Dyer 76. pl. 30.

I confess that what the Lord Coke saith in Ughtred's Case, hath occasioned divers Opinions in the Books, which seem to be contrary, and to which I will give an Answer.

In 1 Roll. Abr. 414, 415. there are several Cases put together to the same Purpose; the first is the Case of Gurnell and Clarke in C. B. where one covenants with the other to pay him 147 l. pro tota transfectione of a certain Freight; and it was adjudged that an Action lies for the Money, without an Averment of Performance on the other Part, &c. But in that Case it doth not appear, whether the Money was to be paid before the Voyage, or after. But the true Answer to that Case is, that a Writ of Error was brought on that Judgment, and the Court of B. R. held that Judgment to be erroneous, as appears 1 Bulst. 167.

The Case of Eaton and Dixon, as it is put in 1 Roll. Abr. 415. seems an Authority in Point against me; A. covenants in the behalf of B. that B. for the Consideration after mentioned, shall convey Lands to C. and C. covenants, pro Considerationibus prædictis, to pay 160 l. to B. But this Case does not come up to the Case in Question. For, First, there is an express Covenant, that B. for the Consideration after mentioned, should convey to C. then C. covenants, for the Consideration aforesaid, (and does not say for the Conveyance of the Land,) to pay the Money, which is to be intended in Consideration of the Covenant aforesaid for conveying the Land.

In the same Vol. there is a Case in Point between Vivian and Shipping; an Award was made between A. and B. that A. shall pay to B. 10 l. and in Consideratione inde, B. shall enter into an Obligation to A. to release all his Right in certain Lands, B. is bound to enter into the Obligation, tho' A. doth not pay him the 10 l. and this  
by

by the Opinion of Jones and Berkley against Croke. I give this Answer to this Case, viz. Rolfe says that it is held to the contrary, Mich. 10 Car. B. R. but a full Answer to it is, that he has mistaken in the Report thereof, and the Judgment was directly contrary, as appears 1 Cro. 384: where Jones and Berkley against Croke held, that the Payment of the 10 l. is a Condition precedent. And there was no such Point in Hayes and Hayes's Case, as Rolfe (in Vivian and Shipping's Case) says there was; the Case is reported at large in 1 Cro. 433. and there is no such Point. I have given an Answer to the chief Authorities; there are some Opinions dispersed in the Books, of which I will not take Notice.

Then as to the Reason of the Thing, the Bargain ought to be performed as it is made, and there is no Reason that a Man should pay for a Thing if he hath it not. Certainly one, who pays Money for a Horse, ought to have the Horse. I agree that two may make an Agreement, one to pay so much, and the other to deliver a Horse, if they will; and on such mutual Promise, they may have mutual Actions: But then they may also make the Agreement otherwise, and there is no Reason that a Man should be compelled to give Credit *nolens volens*, which would be very hazardous in Bargains.

If one says to another, I will give so much for your Horse, and he agrees to take it; if nothing more passeth between them, and no Earnest is given, and they depart one from the other, that, in Point of Evidence, is to be taken but as a Conversation. And so is Dyer, fol. 30. pl. 203. and 14 H. 8. 22.

There is a Case in 2 Mod. Rep. 33. between Smith and Shalden; the Plaintiff declares, that in Consideration that he had promised to assign his Interest in such a House, the Defendant promised to pay him so much, &c. the Question was, whether the Plaintiff ought to aver that he had assigned the Interest in the House? And it was ruled, that he need not make such Averment, on the Authority of Ugh-tred's Case.

They also relied on the Case of Ware and Chapple, Style 186. but that is a different Case; for there two Acts are to be done; the one of which is not a Reward or Satisfaction for the other, and therefore I do not think (as Justice Ellis in that Case of Smith and Shalden) that it was a hard Case, but a plain Case.

Then in our Case, if the 7 l. were not due at the Time when the Release was made, the General Words of the Release will not discharge it.

An Exception was taken to the Declaration, that the Plaintiff has not averred that he has released the Equity of Redemption, but the Plaintiff has averred that he has done all on his Part, which is sufficient in Substance. However the Defendant by pleading the Release hath admitted, and cured that Fault. There are very strong Cases in the Books to this Purpose, 3 H. 6. 8. 9 H. 6. 15, 16. 1 Ventr. 114. and 126. Barnard *versus* Mitchel; and Vivian and Shipping's Case, 1 Cro. 384. is in Point as to the Declaration, and therefore the Judgment in C. B. was affirmed.

I have reported this Case more at large than others, because it is of great Use in many Cases which frequently happen.

Pottet *versus* Pearson. Pasch. 1 Ann.

**E**rror of a Judgment in the Common Pleas on a Note, ( 6. )  
to pay the Plaintiff, or Order, so much Money; the Plaintiff declared that there was a Custom in London among Merchants trading there, that if a Merchant signed a Note, promising to pay to J. S. or Order, &c. that he became bound by the Custom, &c. and Acherley would have distinguished this from another Case laid on the Custom of Merchants, this being laid as a special Custom in London, and that confessed by the Judgment by Nil dicit. 1 Salk. 129.  
1 Salk. 125, 364.

Sed per Holt C. J. this Custom to oblige one to pay by Note, without Consideration, is void and against Law. Ex nudo pacto non oritur actio. The Judgment was reversed.



## Action sur le Case sur Assumpsit.

Meredith *versus* Short. Pasch. 1 Ann.

( 1. )  
1 Salk. 25.

**T**HE Plaintiff declares, whereas at the Request of the Defendant he had delivered to the Defendant a Note, given him by J. S. for 50 l. the Defendant, in Consideration thereof, promised to pay him 50 l. After Verdict, it was moved in Arrest of Judgment, that it is not a Gift, but a Delivery, and that the Note was useless and of no Value, because it does not appear to be for a Consideration.

Lutw. 148.  
2 Saund. 136.  
2 Lev. 119.  
Palm. 171.  
1 Lev. 165.  
2 Salk. 125.

Holt C. J. The Delivery shall be intended absolute and indefinite; and it is Evidence of a Debt, and therefore the Parting with it is a good Consideration.

Far. 13. Vid. 3 Cro. 155, 170. contra.

Gould *versus* Johnson. Pasch. 1 Ann.

( 2. )  
1 Salk. 25.  
Far. 143.  
S. C. called  
Booth and  
Johnson.

**T**HE Plaintiff declares on a Promise, in Consideration he would receive A. B. and C. into his House ut Hospites, and find them all Necessaries, to pay what was deserved; and says that he did receive them, &c. and did find them, &c. and the Defendant has not paid, &c. The Defendant demurred, because it was not said he received them ut Hospites, which is a Special Receiving, as Inn-Keepers do, and that a precise Performance was necessary.

1 Sid. 309.  
3 Lev. 55.  
6 Mod. 227,  
259.  
Poph. 193.  
Yelv. 87.  
1 Saund. 7.  
6 Mod. 77.  
Post. 29. pl.  
30.

Per Holt C. J. & Cur': This is a sufficient Performance, for the Receiving here mentioned, is Receiving them ut Hospites: And Evidence of such Reception would well prove them to be received ut Hospites. If they were received as Servants, and not as Guests, it should have been pleaded on the other Side, with a Traverse of their being received ut Hospites. A finding Beat, &c. must be intended a Guesting of them, till the Contrary be shewed. These Cases were cited on the other Side, and answered. 2 Cro. 45. Jones 441. 2 Co. 245. Yelv. 175. S. C. Far. 143. called, Booth and Johnson.

Action

## Action sur Indebitatus Assumpsit.

Dewbery *and* Chapman. Trin. 7 W. 3.

**T**HE Defendant took the Plaintiff's Son Apprentice, and received 30*l.* to teach him the Trade of a Goldsmith, and make him Free of London, (the Defendant himself being a Foreigner;) so he was bound also to a Freeman for that End: But by the Custom of London, he cannot have his Freedom without actual Service with such Freeman. (1.)  
Com. 341.

It was ruled by Holt C. J. that an Indebitatus assumpsit lies not; the Defendant hath cheated the Plaintiff of his Money, and the Plaintiff hath no Remedy, unless by Special Action of the Case, for not making him a Freeman.

*At Guild-Hall, London, 14 Junii 1695.*

**I**N Indebitatus assumpsit for Money received to the Plaintiff's Use, and he gives in Evidence that he is a Burgess of Westminster, and the Defendant Bailiff there, and that the Plaintiff gave the Defendant 9*l.* to be excused from Fines for Non-appearance at the Court, and from the Offices of Constable and Scavenger; which the Defendant took, promising to excuse him; and at the next Court the Plaintiff was fined. (2.)  
Com. 341.

Holt C. J. Away with your Indebitatus, 'tis but as a Bargain, and no Indebitatus lyeth.

Shower pro Quer'; Where a Custom-house Officer hath taken a Bribe not to make a Seizure, it hath been often ruled that an Indebitatus assumpsit lieth.

Holt C. J. Never by me; I think it hath been carried too far, and I will retrench them. I confess where a Man is overreached upon an Account, &c. and pays more than is due, it hath prevailed that Indebitatus lieth; and that is as far as it ought to go.

Quer' non prof'.

Holmes *versus* Hall. Pasch. 3 Ann.

( 3. )  
6 Mod. 161.  
1 Salk. 24.  
27, 28.  
6 Mod. 309.

**I**Ndebitat' assumpsit by Executor, for so much Money of the Testator received by the Defendant to the Use of the Executor.

The Evidence was, that some Writings of the Testator came to the Defendant's Hands, which he would not deliver up to the Executor, who, to get the Writings, gave him so much Money, whereupon he promised to give up the Writings, but after refused.

It was objected that the Plaintiff mistook his Action, for he should have brought Case upon the Special Agreement, for the Non-delivery of the Writings.

Holt C. J. If A. give Money to B. to pay to C. upon C.'s giving Writings, &c. and C. will not do it, Indebit' will lie for A. against B. for so much Money received to his Use. And many such Actions have been maintained for Earnests in Bargains, when the Bargainor would not perform, and for Premiums for Insurance, when the Ship, &c. did not go the Voyage. But it has been held, it would not lie for Money paid upon an Usurious Contract, because there it was not intended it should be repaid, or any thing done for it.

Darnel quoted a Case, where he said, One had undertaken to obtain a Pardon for another, and to that End got several Sums of Money from him, but had not got the Pardon, and an Indebit' for Money to the Plaintiff's Use brought, and yet the Plaintiff had been nonsuited before Holt.

Which Holt C. J. utterly denied.

Affer *versus* Wilks. Hill. 6 Ann.

( 4. )

**T**HE Plaintiff feme sole married the Defendant, who was married to another; an Indebitatus assumpsit was brought upon a Receipt for Rent of a House belonging to the Plaintiff. For the Defendant it was argued, an Indebitatus assumpsit will not lie, because he did not receive it to the Plaintiff's Use, but to his own: Admitting they were not married, then this will amount to a Disseisin in the Defendant, and it was never adjudged that the Disseisee could maintain an Indebitatus assumpsit against the Dis-



seisor; but if he is not a Disseisor, then he is a Receiver, and then an Action of Account ought to be brought against him.

Eyre ad idem; In all Actions for Money received, it must be due to the Plaintiff upon a Contract.

Whitaker contra; The Action will lie, for the Plaintiff was present when the Money was received by the Defendant, which proves that it was by her Consent. 4 H. 7. 68. 3 Cro. 82, 83. F. N. B. 172. 1 Inst. 89. b. Kelw. 131. — 106. of a Guardian, this Case was held to be Law by Holt C. J. where a Man takes the Profit of an Office, tho' he is a wrong Doer, an Assumpsit will lie. 2 Mod. 162, 263. 1 Mod. 122.

Darnell: Where a Man receives Rent by a false Token, an Assumpsit or Trover will lie.

Holt C. J. Trover will not lie in this Case, because she was never possessed of the Monies. By her Marriage she consented the Man should manage her Estate; if he was her Husband, then he received the Money to his own Use; but if not, then to her Use. The Lady Cavendish and Middleron, 1 Cro. 103.

If two agree to run a Race, and the Money is staked in the Hands of B. he that wins shall have an Indebitatus assumpsit against B. the Stake-holder, for Money received, because he received it to the Use of the Winner, 2 Syd. 4.

The whole Court adjudged that this Action did well lie.

## ACTIONS on STATUTES.

Combes v. Hundred de Bradley. Trin. 6 W. & M.

**A**N Action was brought upon the Statute of Win-  
ton, for that upon the 23 of February 5 W. & M. certain Malefactors, to the Plaintiff unknown, did assault him at H. in the Hundred of Bradley, in the County of Gloucester, and robbed him of 30 l. 12 s. 6 d. of his own Money, whereof he immediately gave Notice at N. within the said Hundred, and near the Place where he was robbed, and that none of the Thieves were taken. A Special Verdict at the Assizes finds the Assault, Robbery, and taking from the Plaintiff 30 l. 12 s. 6 d. and a Mare which returned; and that 30 l. 11 s. of the Money  
L was

(1.)  
4 Mod. 303,  
&c.  
2 Salk 613.

was the proper Money of Andrew Baker, his Master, who was not present when the Robbery was committed, but that the Plaintiff had the same in his Possession for the Use of his said Master; and that the Robbers were Strangers to him, and so made a general Conclusion.

The Question was, whether the Servant being robbed of his Master's Money (he being not present) may declare de denariis suis propriis.

The Plaintiff had Judgment by the Opinion of the whole Court; and that in this Case either the Master or the Servant may maintain the Action.

Anonymus. Mich. 10 W. 3.

(2.) Holt C. J. **I**T was resolved lately by ten of us, that no Action of Debt lies in Westminster-Hall, for exercising a Trade contrary to the Statute, out of the proper County: But the Prosecutor is restrained by the Statute 21 Jac. 1.

5 Mod. 425.

1 Salk. 373.

4 Mod. 145,

146, 164.

Carth. 465.

6 Mod. 128,

220.

1 Salk. 67.

2 Salk. 613.

5 Mod. 225.

But we were also of Opinion, that this Statute 21 Jac. c. 1. only extends to Acts made before that Act, and not to subsequent Acts of Parliament.

My Lord Chief Justice Hale was always of Opinion against the Case of Hughes, according to our Resolution.

## ACTION for WORDS.

Venable *versus* Daft. Hill. 1 W. & M.

(1.) **I**N Case for Words spoken the fifth of November; the Declaration was generally of the same Mich. Term. Verdict for the Plaintiff, and Damages.

Show. 147.

Northy and Shower moved in Arrest of Judgment, because the Declaration was earlier than the Action accrued, viz. of the first Day of Term; and cited the Case of Jenkinson *versus* Thompson, in an Information Qui tam, &c. Judgment was arrested.

And Holt C. J. declared himself dissatisfied with the Judgment in Jefferey's Case, which was to the Contrary.

Geary *and* Connors. Hill. 4 W. & M.

**I**N an Action for Words per quod maritagium amisit, the Plaintiff proved Part of the Words only; but proved that by Reason of them maritagium amisit. ( 2. )  
Skins. 353.

Ruled by Holt C. J. to be well enough: For 'tis sufficient if the Plaintiff proves the Loss of Marriage by Reason of any Words in the Declaration.

Somers *and* House. Mich. 5 W. & M.

**Y**OU are a Rogue, and broke open a House at Oxford, ( 3. )  
and your Grandfather was forced to bring over 30 l. to make up the Breach. After a Verdict for the Plaintiff, moved in Arrest of Judgment, because Rogue is actionable; and breaking open the House was but a Trespass, and making up the Breach might be Repairing. But the Court seemed contra; for upon all the Words together, a Man who heard them could not intend other than a felonious Breaking of the House. And tho' in the old Books the Rule was, to take the Words in mitiori sensu;

Pet by Holt C. J. they would give no Favour to Words, and should give Satisfaction to them whose Reputation is hurt; and would take Words in a common Sense according to the vulgar Intendment of the By-standers. The Rule de mitiori sensu is to be understood, where the Words in their natural Import are doubtful, and equally to be understood in the one Sense as in the other. Adjudged for the Plaintiff.

Hooker *versus* Tucker. Mich. 6 W. & M.

**H**E is a pitiful Fellow, and not able to pay his Debts, ( 4. )  
spoken of a Merchant, adjudged actionable. Sid. 424. Comb. 292.  
425. Drake *versus* Hill. See 1 Lev. 276.

And per Holt C. J. It is not material whether the Words import a Bankruptcy; but the true Reason is, because it is a Scandal to a trading Man; and there needs no Averment that he was no pitiful Fellow, and was able to pay his Debts.



Ogden *versus* Turner. Hill. 2 Ann.

(5.)  
6 Mod. 124.

1 Jo. 196.  
1 Cro. 140.

Yelv. 9.

2 Cro. 58, 59.  
Yelv. 64.  
2 Vent. 265.  
1 Cro. 140.  
1 Rol. Ab. 60.  
1 Jo. 195.

1 Salk. 696.

CASE for these Words, There goes *Ogden*, who is one of those that stole my Lord S.'s Deer.

Cur'; Words which of themselves are Actionable without Regard to the Person, or foreign Help, must either in danger the Party's Life, or subject him to infamous Punishment; and it is not enough that the Party may be fined and imprisoned: For if one be found Guilty of any common Trespass, he shall be fined and imprisoned, yet none will say, that to say one has committed a Trespass will bear an Action; or at least the Thing charged upon him must in it self be scandalous. And this here is, That he stole a Deer, which is *Fera Naturæ*, ideo not scandalous. To say such a one burnt a Barn, without saying that it was Part of a Mansion-house, or had Corn in it, not actionable. And the Case of Sir Lionel Walden in 2 Vent. was carried too far, and happened in a dangerous Time, when the Kingdom in general were more furiously enraged against Popery; the Words were, L. W. is a Papist, and goes to Walls. And the Penalty by the Statute is a Pecuniary one, and the Pillory is only for want of Money, so it is not the direct Penalty given by the Statute.

And besides, Holt C. J. said, That Pillory upon this Account did not make the Person infamous, but he would remain a good Witness nevertheless. And to say that one has hunted in a Park without Leave of the Owner, and killed a Deer there, which subjects him to the Penalty of the Statute de Malefactoribus in Parcibus; or to call a Ban a Papist simply, would not bear an Action. And he said, that to say of a young Woman that she had a Bastard, is a very great Scandal, and for which, if he could, he would encourage an Action; but it is not actionable, because it is a spiritual Defamation, punishable in the spiritual Court; so it is to call a Ban a Heretick. And he denied the first Reason given in *Anne Davis's Case*, 4 Co. 17. a. Et per tot' Cur': Querens nil capiat per Billam.

# A D D I T I O N.

*Lord Banbury versus Wood.* Intr. Mich. 2 Ann.

**I**N a Homine Replegiando, Want of Addition to the Pluries was pleaded in Abatement: And on Demurrer the Question was, whether this was within the Statute of 1 H. 5. c. 5. Of Additions.  
Per Cur'; Respondeat Ouster.

( 1. )  
6 Mod. 84,  
85.

*Queen versus Hoskin.* Mich. 2 Ann.

**A**Servant was indicted for a Trespass, by the Name of A. B. Servant to J. S. and Exception was taken that there was no Addition, Servant being not good.

Holt C. J. Servant to J. S. is a good Addition, and as certain as Gentleman.

( 2. )  
6 Mod. 53.

Ero. Additions 56, 58,  
&c.

*Lepiot versus Browne.* Trin. 3 Ann.

**T**HE Defendant being removed by Habeas Corpus into Custod. Marechal. The Plaintiff declared against him by the Name of J. B. of such a Place; to which he pleaded, that his Father lived in the same Town, and that his Name was also J. B. and concluded in Abatement, for want of the Addition of Junior, to distinguish him from the Father; and by the Common Law there ought to be an Addition in this Case of the Son, tho' it was by Bill, and so not within the Statute of Additions: Indeed if the Father were sued, then J. B. without Addition, would be taken for the Father.

( 3. )  
Mod. Caf.  
198, 199.

Raft. Ent.  
510.  
33 H. 6 54.  
37 H. 6. 29.  
4 Ed. 3. 50.  
5 Ed. 4. 23.

Holt C. J. If a Father and Son be called J. S. and one by Will devises his Lands to J. S. this Prima facie shall be understood the Father; but if the Devisor did not know the Father, the Son shall take: And suppose one deals with the Son, and knows nothing of the Father, shall he at his Peril take Notice that he has a Father of the same Name? The Defendant, by bringing the Hab' Corp' had concluded himself, if you had relied upon it: And if this were an Original, and the Father and Son had lived in

M

different

11 Rep. 89. different Counties, there had been no Occasion of Addition  
1 Keb. 182. of Junior.

Judgment quod Respond. Ouster nisi, &c.

## ADMINISTRATOR.

Fortre *versus* Fortre. Pasch. 3 W. & M.

( 1. )  
1 Show. 551.

**A** Mandamus was moved for to the Ecclesiastical Court, to grant Administration to the Wife of the Goods of her Husband deceased: And it was denied per Cur'.

By Holt C. J. They may grant Administration to the Widow, or next of Kin, which they will; but where the Wife dies, the Husband is to have the Administration, he being the only lawful next of Kin by the Statute of 31 Edw. 3.

Newton *and* Richardson. Mich. 6 W. & M.

( 2. )  
Skin. 565.

**S**cire facias was brought against an Administrator, upon a Judgment against an Executor; he pleads plene Administravit the Day of the Writ purchased: The Plaintiff demurred; for he ought to plead riens enter mains at the Time of the Death of the Testator: But if he had joined Issue, this had been a Waiver of the Advantage of it.

And Holt C. J. cited the Case of Harcourt and Wrenham, More 858. and Ordway and Godfrey's Case, 3 Cro. 575. And tho' some Cases in Keble and the Office of Executors were cited, the Court ruled the Case ut supra, and did not regard the Cases in Keble, but demanded other Authority; they said the Office of Executors was a good Book, but they did not agree with it in this Point.

Yeoman *versus* Bradshaw. Mich. 8 W. 3.

( 3. )  
Co. b. 592.

**A**n Administrator brought Case against the Drawer of a Bill of Exchange; the Administration, on Oyer, appeared to be granted by the Bishop of Durham, and then the



the Defendant pleads in Abatement, that he was at London at the Time of the Intestate's death, and ever since.

Hall pro quer': A Bill of Exchange is a Security for Money, and equal to a Specialty by the Law of Merchants; therefore the Administration taken in Durham, where the Bill was, is good.

Selby, pro Defendente, cited 3 Cro. 472. Byron versus Byron, Office of Executor 66. Dy. 305. 1 Roll. Abr. 908. that all Debts upon simple Contract (as this is) draw the Administration to the Place where the Debtor lives.

Holt C. J. Tho' it be in Writing, it is but as a simple Contract. If there be one Action against an Executor upon a simple Contract, and another upon a Bill of Exchange, and Judgment upon the simple Contract, that may be pleaded in Bar to the other. If an Award be to be in Writing, that doth not alter the Nature of the Action of Debt upon the Award, nor draw the Administration to the Place where the Award is. *Judicium quod billa causetur.*

*Atkinson versus Cornish.* Pasch. 10 W. 3.

THE Plaintiff declared as Administrator durante minore (4)  
estate of T. S. after some Pleadings, there was a Carthew  
Demurrer, and Joinder in Demurrer; an Exception was 446, 447.  
taken to the Declaration, because the Plaintiff had not 5 Mod. 397.  
averred, that T. S. was still under Age of seventeen Years.

Sed per Holt C. J. Where Administration is Granted to one as Guardian to an Infant, who hath a Right to administer, but is incapable to take it by Reason of his Minority, as in the Principal Case, it continues till he attains his full Age: But where an Administration is granted during the Minority of an Infant Executor, the Administration determines as soon as the Executor attains the Age of seventeen. The Plaintiff had Judgment.

*Blackborough versus Davies.* Pasch. 13 W. 3.

ADMINISTRATION was granted to the Grandmother; the (5)  
Aunt moved for a Mandamus to have it granted to 1 Salk. 251.  
her, which was denied; and now she moved for a Mandamus to have a Distribution, being in equal Degree; but it was insisted on by the other Side, that she was not intitled

titled to it, being not so near as the Grandmother, for the Grandmother stands in the Place of the Mother, and is in the second Degree to the Intestate; the Aunts are the Daughters of the Grandmother, and Daughters cannot be in equal Degree with their Mother. Before Stat. 1 Jac. 2. cap. 17. if a Man died without Wife or Child, his Mother had all, and his Brothers and Sisters nothing. That Act was made that the Mother might not carry all away to another Husband, the Father surviving has all at this Day.

Lamb. Sax. L.  
36, 167.  
Glanv. l. 7.  
c. 3.  
Leg. H. 1. c.  
70.  
1 Vent. 323.  
2 Vent. 317.

Per Holt C. J. There ought to be no Mandamus in this Case. By the Common Law, before and at the Conquest, the Children both Male and Female inherited alike, and the Estate whether Real or Personal descended to all equally. In the Reign of King Hen. 1. Females began to be excluded, as to the Real Estate, and the Males inherited equally the Socage Land. About this Time, or in the Reign of Hen. 2. the Father and Mother were excluded from the Real Estate of their Children, but not as to the Personal: And as by the Common Law, the Father and Mother were nearer than Brother and Sister, so the Grandfather and Grandmother are nearer than Uncle and Aunt: And the Grandmother in this Case is the Root of the Kindred, whereas the Aunt is only the Branch.

Anonymus. Trin. 1 Ann.

(6.) Per Holt C. J. **I**F H. gets Goods of an Intestate into his Hands after Administration granted, it does not make him Executor of his own Wrong: But if he gets them before, tho' Administration be granted afterwards, yet he remains chargeable as a wrongful Executor, unless he deliver the Goods over to the Administrator before the Action brought, and then he may plead plene Administravit. Vide 5 Co. 33. b. F. N. B. 44. But if he takes upon him to act as Executor, he is chargeable at all Events.

1 Salk. 297.  
1 Show. 242.  
Dy. 166. b.  
Swinb. 289.  
1 Rol. Abr.  
918. C.  
Far 51.  
7 Salk. 16.

Blainfield *versus* March. Mich. 1. Ann.

(7.) **T**HE Plaintiff brought Trover as Administrator, and declared upon the Possession of the Intestate; and on Not guilty pleaded, the Counsel for the Defendant offered

1 Salk. 285.  
Far. 140.

offered to give in Evidence at the Trial, that the pretended Intestate made a Will and an Executor.

Holt C. J. took this Diversity, that where an Administrator brings Trover upon his own Possession, the Defendant may give a Will in Evidence, and an Executor upon Not guilty; but 'tis otherwise if it be on the Possession of the Intestate, for there the Defendant ought to plead it in Abatement, and if he doth not, he shall not give it in Evidence: So it was over-ruled.

Whitehall *versus* Squire. Pasch. 2 Ann.

A Man possessed of a Horse put it to Pasture to the Defendant, and died Intestate; the Plaintiff W. desired the Defendant to bury him, and agreed that he should have the Horse for his Charges, &c. the Defendant buried him accordingly, and laid out more Money than the Horse was worth: Afterwards, the Plaintiff took out Administration, and now brought an Action of Trover for the Horse.

And Holt C. J. held, that the Action would lie, because the Defendant was a tort Executor; it is true, such an Executor is only liable for the Value he hath received, and when he hath paid that, he is no further answerable as to Creditors; but as to a lawful Administrator, &c. he is still liable in respect of the Tort, in meddling with what belonged by Law to others, and they may bring Trover against him: The Plaintiff's Consent, when he had nothing to do, will not alter the Case; for if he had released, yet he might have taken out Administration, and brought an Action afterwards.

But Eyre and Dolben Justices contra; that the Action would not lie, because the Plaintiff consented and agreed that the Defendant should have the Horse.

The Defendant had Judgment.

Denham *versus* Stephenfon. Trin. 3 Ann.

Willielmus Denham, Gen. Administrator, &c. cui Administratio bonorum & catallorum, jur' & Creditorum quæ fuerunt A. B. tempore mortis suæ, per Thomam Crosland, Artuum Magistrum, Commissarium sive Officialem peculiaris & specialis Jurisdictionis de, &c. legitime fuit. debito modo commissa fuit, and concludes with proferet hic in Cur' Literas, &c.



Mod. Cases  
241  
1 Salk. 555.

and so declared in Debt against the Defendant as Heir at Law, upon the Bond of his Ancestor: Defendant demurred generally.

1 Salk. 301.  
1 Mod. 214.  
2 Jones 72.  
1 Lev. 78.  
3 Lev. 311.  
2 Mod. 65.  
1 Salk. 38.

Mr. Raymond argued, that the Court could not take Notice that every Peculiar had a Right to grant Administration; and that it being a Jurisdiction against common Right, it ought to be averred according to the Precedents, cui de jure Commissio Administrationis in hac parte pertinet, and the debito modo commissa affirms the Regularity of the Manner of Proceeding, not the Sufficiency of the Power and Jurisdiction. Of this Opinion was the whole Court. And Salkeld, who was ready to argue it for the Plaintiff, was stopped by the Chief Justice, & quievit. Afterwards when the Court came to give Judgment,

Holt C. J. Gould and Powys, mutata Opinione, held the Declaration to be good, and that the debito modo was a sufficient Averment.

3 Lev. 193.  
3 Cro. 102.

And Holt C. J. said, there was no Peculiar but had the Power of granting Administration; and that this was a needless Exactness, not so much regarded laterly, as it had been in former Times, when it was thought not enough even to shew an Administration committed by a Bishop, without averring there were nulla bona notabilia. Judgment pro Quer; Powel abiding by his former Opinion. Upon this a Writ of Error was brought in Cam. Scaccar; and Judgment was affirmed per tot Cur'.

### Lawrence *versus* Martin. Hill. 4 Ann.

(10.)  
1 Salk. 7, 8.  
Hob. 177.  
1 Salk. 2.  
2 Roll. 277.  
H. 2.

**A**N Attorney, being sued as Administrator, pleaded in Abatement, that he was an Attorney de C. B. and a Respondeas Ouster awarded. Nota; upon a Respondeas Ouster, no Notice need be given of it; for the Defendant is supposed to be attending upon his Cause in the Paper to maintain his Plea. Mich. 3 Ann. B. R. per Holt C. J.

### Bonner *versus* Underwood. Mich. 5 Ann.

(11.)  
Debt in the  
Debet & Detinet  
against  
an Admini-  
strator on a Devassavit,

**D**Ebt was brought in the Debet & Detinet against the Defendant, upon a Judgment had against him as Administrator, and suggests a Devassavit committed by him.

on a Devassavit, and he pleads that after the said Judgment

The Defendant pleads that the Plaintiff sued against him as Administrator, and obtained Judgment; and that afterwards, and before this Action brought, the Administration committed was repealed, and committed to one Law, to whom he paid the Residue of the Goods of the Intestate, having first satisfied himself of 20 l. which the Intestate owed the Defendant for Wages. The Court took Exception to this Pleading, because the Defendant did not traverse the Devallavit; for without Waste the Defendant could not be charged in the Debet & Detinet; and this is the usual Way of Declaring since the 20 Car. 2. *Wheatly v. Lane*, 1 Sand. 216. 1 Lev. 255. So they desired Serjeant Hall to take Time to consider of it. For the Gift of the Action is the Waste, which you should traverse; but if the Fact be with you, perhaps we may allow you to amend your Plea upon Payment of Costs. Therefore you do well to consider of it.

## A D M I R A L T Y.

Beake *versus* Tyrrell. Pasch. 1 W. & M.

Vide supra Hil. 3 & 4 Jac. 2. Rot. 334, vel 173.

**T**RESPASS for taking a Ship, &c. Defendant pleads, (1.)  
That he was Captain of a Man of War, and <sup>1 Show. 6.</sup>  
that he took her on the High Seas as a Prize,  
and carried her to ———, and there prosecuted  
her, and condemned her in the Admiralty as a Prize, &c.  
Demurrer.

Holt C. J. That he was Captain is well enough; he need not shew his Commission: But it doth not appear how this Ship came to be a Prize, nor that there was any Cause to seize her as such, nor that there was any War: The subsequent going to the Admiralty cannot justify the first illegal Caption. Besides, it is not shewn whose Court of Admiralty it was, nor before what Judge. *Judic' pro Quer'*, by the whole Court.

This was an Interloper seized by the East-India Company, and carried to the Indies, and there condemned by the Company's Admiral, &c.

Corset

*Corset versus Hufely.* Trin. 1 W. & M.

(2.)  
Com. 135,  
136.

A Ship was hypothecated at Rotterdam by the Master of it, for the necessary Repair of it; and now Suit is against the Master of the Ship in the Admiralty; and if a Prohibition lieth is the Question.

Holt C. J. The Master may in Case of Necessity pawn the Ship, tho' at Land; but here is no Colour for a Prohibition, for it is a Matter properly triable by the Maritime Law, and they have no Remedy at Common Law.

Dolben, Eyres, and Gregory agreed, and a Consultation was awarded; and Dolben said, he wondered that this could be made a Question, since it was admitted that the Money was for the Use of the Ship, but if the Master had employed the Money to his own Use, a Prohibition should have gone.

*Bayly versus Grant.* Trin. 12 W. 3.

(3.)  
1 Salk. 33.

THE Mate sued the Master for Wages in the Admiralty, a Prohibition was moved for, because the Master himself could not sue there, and the Mate was not in nature of a Mariner, but was to succeed the Master if he died in the Voyage.

Denied per Holt C. J. For the Master contracts with the Owners, but the Mate contracts with the Master for his Wages, as the rest of the Mariners do.

*Johnson versus Shepney.* Mich. 2 Ann.

(4.)  
6 Mod. 79.  
S. C. 1 Salk.  
35.  
6 Mod. 11,  
12, 25.  
1 Vent. 32.  
238.  
1 Lev. 267.  
1 Sid. 418.  
2 Keb. 511,  
610.  
Hob. 12.  
Moll. lib. 2.  
cap. 2. § 14. 15.  
3 Mod. 244.

A Ship at Boston in New England was hypothecated by the Master for Necessaries, having been in Distress at Sea; and being libelled against here, a Prohibition was moved for, because the Contract appear'd to be upon Land, even on the Libel. It was urged against it, that if the Distress which occasions the Contract be on Sea, tho' the Things be bargained for at Land, (for they cannot be had at Sea) they have Jurisdiction, otherwise the Prejudice would be intolerable to Navigation. And *Benson versus Jeffries, Hill. 96.* was quoted.



Holt C. J. When a Ship is in Distress in her Voyage, and hypothecated for Necessaries, we allow the Admiralty a Jurisdiction, for there is no other Way for him to have Credit but that; and they can have no Remedy by our Law against the Ship. This Point was argued and resolved by all the Judges, in the Case of Croftwick versus Lowfely, 1 W. & M. vide 1 Salk. 34.

But the Libel being against the Ship and Party, the Court said, they would send a Prohibition as to him, unless quatenus it is necessary to make him Party towards the Condemnation of the Ship; and so it was done. For Prohibitions to the Admiralty, and other Matters concerning that Court see Carthew 26, 32, 166, 294, 398, 423, 474, and 518. See also Skinner 59, 93, 230, 279, 334, 361.

Brown's Case. Pasch. 5 Ann.

**L**ibel in the Court of Admiralty for Seamens Wages, and the Defendant there pleaded, that by the express Agreement there was no Landing-Port, till the Ship returned to London, for that the Ship was to go to the Coasts of Guinea with Goods, and to return back to London. The Ship sailed to the Coast of Guinea, and in her Return was taken by the French. All this was pleaded below, and the Court there did award us to depose the Money in Court, to attend the Success of the Cause. And we have an Affidavit of this, and pray a Prohibition, which was denied per Cur', because this is Judging of their Proceedings below in their Jurisdiction, and your Remedy is by Appeal.

Holt C. J. said, You cannot have Prohibition to the Admiralty Court before Sentence, *secus* to Court Christian.

Gawne *versus* Grandee. Mich. 5 Ann.

**T**he Defendant and other Seamen libelled in the Admiralty Court for their Wages, and set forth in their Libel that they went to such a Place, or Coast, in the East-Indies, and that the Plaintiff had not paid them their Wages, &c.

Sir James Montague moved for a Prohibition, for that Court will not, by their Way of Proceeding, receive our Oath, and the Mariners had a Contract under Hand and Seal; but the Prohibition denied.

(5.)  
No Prohibition to the Admiralty, till after Sentence, *secus* to the Spiritual Court.

(6.)  
A Prohibition moved for to the Admiralty, for that there the Plaintiff's Answer would not be taken but upon Oath.

Answer, but upon Oath; by which means we will be forced to discover that we traded to the East-Indies, and so incur a Penalty inflicted by Act of Parliament, which is general, prohibiting all the Subjects of England to trade or traffick there, except they have a Licence, or are of the East-India Company. Besides, these Mariners have a Contract under Hand and Seal for their Wages, on which they may sue at Law. But the Prohibition was denied; for it is reasonable and just, whether their going thither was lawful or not, that you should pay them their Wages. There is no unlawful Act suggested, and if there be a Contract under Hand and Seal for their Wages, yet the Admiralty may have Jurisdiction thereof as incidental; but if they judge contrary to our Law, we will prohibit them. But they on the other Side deny the Contract to be as you have alledged. If I steal Goods, and the right Owner takes them from my Vender, the Vender may sue me in Equity to enforce me to discover my Title to those Goods, and I shall be enforced to answer.

## A D U L T E R Y.

Rigault *versus* Gallizard. Mich. 1 Ann.

(1.)  
Farell. 78,  
79, So, &c.  
2 Salk. 552.

**O**N a Prohibition, the Declaration set forth, that at the Sessions of the Peace held at Westminster on such a Day and Year, &c. the Plaintiff was indicted for making an Assault upon Louise Regault, the Defendant's Wife, with Intent to have Carnal Knowledge of her, and it was laid to be against the Peace of the King, &c. And that the now Defendant likewise brought an Action of Assault and Battery against him, which was also laid to be contra Pacem, which Suit is still depending; and yet the said Defendant has ordered him to be sued in the Bishop of London's Court, for Solicitation of the said Louise Rigault's Chastity, to commit Adultery with him. The Defendant pleads for a Consultation, that he is not charged below for any of the Crimes alledged in the Indictment or Action; and to this Plea there is a Demurrer.

By Holt C. J. The Prohibition ought to stand; it was but one entire Act, and they below cannot divide it; for the Plaintiff in the Prohibition has averred the Fact for which he was indicted, and that for which the Suit is below, to be

he the same, which should have been traversed, and that it was for other Cause than in the Indictment, &c. If a Man solicits a Woman, and goes gently to work with her at first, and when he finds that will not do, he proceeds to Force, it is all one continued Act, beginning with the Insinuation, and ending with the Force: And this being an Attempt and Solicitation to Incontinency, coupled with Force and Violence, it does by Reason of the Force, which is Temporal, become a Temporal Crime in the whole. An Indictment will not lie for a plain Adultery, but Libel in the Spiritual Court will. And the Law indulges the Husband with an Action of Assault and Battery for the Injury done to him, tho' it be with the Consent of his Wife, because the Law will not allow her a Consent in such Case, he having an Interest in her: And he compared it to the Case of calling a Woman Whore and Thief, there she shall not Split the Words, and punish him below for calling her a Whore, and at Law for calling her a Thief.

1 Cro. 286.  
2 Keb. 589.  
1 Vent. 52.  
1 Sid. 438.  
Palm. 379.

Holt Ch. J. agreed, if Adultery be committed with another Man's Wife, without any Force, but by her own Consent, tho' the Husband may have Assault and Battery, and lay it Vi & Armis, yet they shall in that Case punish below for that very Offence; because no Indictment lies at Common Law for such an Assault and Battery, neither shall the Husband and Wife join in the Action: And therefore they proceed below either Civilly, that is to divorce the Husband and Wife, or Criminally, because the Parties were not criminally prosecuted above. And the true Action for the Husband in such Case, is a special Action, Quia the Defendant rapuit his Wife.

2 Inst. 483.  
1 Rol. Abr  
295.  
Rait. Tresp.

Cur' accord', for that the Offence is not merely Spiritual.



## A D V O W S O N.

*Bishop of Salisbury v. Phillips.* Mich. 11 W. 3.  
Rot. 377.

( 1. )  
Carth. 505.  
Lutw. 1084  
to 1130.  
1 Salk. 43, 44.  
2 Salk. 559.

2 Mod. 97.

Co. Lit. 164.  
b.

**I**N Quare Impedit, Plaintiff Executor counts that A. and B. were seised in Fee as Joint-Tenants of the Advowson ut de grosso, and by Indenture agreed from thenceforth to be seised thereof as Tenants in common, and not as Joint-Tenants, and that they and their respective Heirs should present severally and by Turns, and shews several Presentations alternately, &c. and then makes Title in himself under this Agreement: The Bishop claims Title by Lapse. Plaintiff replies, that his Testator presented Symes within six Months, and the Bishop refused him. Defendant rejoined, he gave him three Days Time to prepare for Examination, and he never came again; Absque hoc, that the Bishop refused Symes at the Presentation of the Testator. After Issue joined and a Verdict pro Quer', and Judgment in C. B. Error was brought in this Court. Carthew objected that the Plaintiff had no Title; for the Agreement to present by Turns did not sever the Right, the Indenture did not work a Partition, but an Agreement, which is now broken, for which the Plaintiff may take his proper Remedy.

Holt C. J. held it to be a good Partition the first Time it was spoken to, saying, that where the Thing and the Profits are the same, a Partition of the Profits is a Partition of the Thing. Afterwards when Judgment was affirmed, he said, That a Composition might be either by Record, or by Deed, or by Parol. That if either Privies in Blood, as Copartners, or Strangers in Blood, as Tenants in Common, or Joint-Tenants, agree by Record to present by Turns, and one present, the other is not by an Usurpation put to a Quare Impedit; and that whether the Presentation be by one Privy to the Agreement, or by a Stranger. Vide West 2. 5. 2 Inst. 362. 2. That if either Privies in Blood, as Copartners, or Strangers, as Tenants in Common, or Joint-Tenants, agreed by Deed to present by Turns, the Composition is good; and if it be once executed on all Sides, he that brings a Quare Impedit need not mention the Composition. Vide Dy. 29. 3dly, By Parol;

Co. Ent. 496.  
Dyer 29.

Parol; for so a Composition may be between Parceners; but between Strangers in Blood Composition cannot be without Deed. Vide F. N. B. 60, 62. d. f. 11 H. 4. 3. b. Judgment affirmed.

A G E.

Anonymus. Mich. 3 Ann.

Holt C. J. **I**T had been adjudged that if one be born the first of February at eleven at Night, and the last of January in the Twenty-first Year of his Age, at one in the Morning, he makes his Will of Lands, and dies, 'tis a good Will; for he was then of Age. (1.) 2 Mod. 215. 6 Mod. 260. 1 Salk. 44. 2 Salk. 413, 625, 627.

A G R E E M E N T.

Knight and Keech. Int. Mich. 4 Rot. 60. Pasch. 5 W. & M.

**C**ASE: Upon an Agreement, in which the Defendant promised to assign to the Plaintiff all the Profits, which accrued by a Voyage made by a Ship of the first Husband's of the Wife of the Defendant; and Breach assigned that the Defendant non performavit agreementum prædict'. Issue joined, and a Verdict, and Judgment in C. B. for the Plaintiff, and Error brought, because the Breach was too general and uncertain; for he doth not shew in what he did not perform the Agreement, as he ought to do. As in Covenant to repair, he ought to shew that the House was defective in such a Part, and that the Defendant had not repaired it; and to say that he had not repaired generally is not good; non allocatur. For Holt C. J. and Eyres Just. said, If this had been upon a Demurrer, it would have been good; but it being  
P. after

after a Verdict, it is beyond Question : For the Plaintiff would not have had Damages given, if he had not proved a good Breach, and here the Agreement is single, scil. to assign. So the Non-performance is the Non-assignment, and it being negative, and in the Words of the Agreement, the Judgment was affirmed. 3 H. 6. 8. 9 H. 6. 16.

## A M E N D M E N T.

Walker *versus* Slackoe. Hill. 6 W. & M.

( 1. )  
5 Mod. 16.  
69.

**I**N this Case an Attorney gave a Note to the Curstoz thus : Inter A. in Trespass, and five Defendants, naming them, one of the Defendants is dead, make out a Writ of Error : The Curstoz makes it out in the Name of four only, and omits to say that the other is dead. It was moved to have this amended ; but the Counsel for the Plaintiff insisted that it was an Error in Judgment, which is not amendable.

1 Cro. 147,  
148.

Holt C. J. I will tell you a Case wherein an Omission of this Nature was judged Amendable : In Debt on a Bond against an Heir wherein he was bound, the Curstoz made out a Writ in which he did not express that the Heir was bound, as perhaps thinking him bound without it ; yet after Verdict it was amended and put in, which was an Error in his Judgment, and amendable because he had the Bond before him. In the Case before us, the Notes to the Curstoz were as full as need be.

Mich. 7 W. 3. This Matter was moved again.

( 2. )  
1 Sid. 104,  
138.  
1 Lev. 29.  
2 Mod. 153.

**A**ND by Holt C. J. the Writ of Error is not good, for all the Parties to the first Judgment ought to join in Error, and it appears they have not done so here ; it not being said, he that is omitted is dead, the Writ of Error is ill. But supposing this is only a Mistake of the Curstoz, the Question is, if it be amendable ? And we are of Opinion that it is not, because this is a Writ to reverse a Judgment ; and the Statutes were only made



to amend Writs for the Support of the Judgment: So is 8 H. 6. c. 12. If this Fault were amendable, it must not be at the Motion of the Defendant, for no Man can pray to amend another's Plea or Writ, tho' he may take Advantage of it: Every one may Sue or Plead as he thinks fit; and if this were allowed, it would force the Plaintiff to Sue in another manner, and it is not within any of the Statutes of Amendment.

In Blackmore's Case, the Judges have Power of Amendment in Affirmance of Judgments: And in no Case whatever did the Court amend to set aside a Judgment, but to support it; and that was the Design of all the Statutes. The Writ was quashed. 8 Rep. 158.

Greenwood *and* Piggon. Mich. 7 W. 3.

John Greenwood Plaintiff, against the Defendant Thomas, who came and justified, the Plaintiff replied and took Issue, & hoc prædict' Johannes petit quod inquiratur per patriam; & prædict' Johannes similiter, where it ought to be Thomas; it was objected, no Issue is joined, the Plea Roll and Nisi prius Roll were wrong, and so was the Paper Book; the Court ruled it to be amended Nisi causa, &c. ( 3. )  
Skin. 591.

For per Holt C. J. It is a Misprision of the Clerk, apparent in the Nature of the Thing, and therefore amendable, tho' mistaken throughout, as well as if the Plea Roll or Nisi prius Roll had been right.

Cox *versus* Wilbraham. Pasch. 13 W. 3.

Action of Covenant; the Plaintiff assigns a Breach upon the Words, That the Defendant had not made done or suffered any Act or Thing to incumber, &c. and the Breach was, Quod ad Session. Cestrie tent. &c. Anno, &c. utlagat. fuit. The Defendant demurred, and the Declaration was held Naught for Uncertainty when or what Term the Outlawry was had; on which Counsel moved to amend, and insisted that there was no Difference between after Verdict and Demurrer. ( 4. )  
1 Salk. 50.

Per Holt C. J. If the Defendant had pleaded a Plea to the Right or in Abatement, it might be reasonable to allow an Amendment; but to amend upon Demurrer, when this may 1 Cro. 147.  
1 Sid. 54.  
14 Ed. 5. 6.  
3 Lev. 39.

may be the Cause of the Demurrer, would be to ensnare the Defendant without Cause.

The Motion was disallowed.

The Queen *versus* Tutchin. Mich. 3 Ann.

( 5. )  
Mod. Caf.  
268, 274,  
285.  
1 Salk. 51.

**A**N Information was exhibited against the Defendant by the Attorney General, for contriving, composing and publishing a certain seditious Libel, intituled, The Observator; and pleading Not guilty in Trinity Term, a Venire fac<sup>s</sup> was issued out to the Sheriffs of London, where the fact was laid, returnable die Lunæ prox. post tres Sept. Sanct. Mich. and the Distingas was then awarded on the Roll in the common Form, &c. But the Distring. by Mistake was tested the 24th of October, whereas the Venire was returned the 23d. And after Verdict for the Queen, it was moved in Arrest of Judgment, that this was a Discontinuance; but the Question was, whether it might not be amended?

7 Ed. 4. 15.  
4 Ed. 3. 9.  
5 Ed. 3. 25.  
3 Lev. 420.  
7 H. 6. 27.  
Fitz. Amend.  
32.  
22 Ed. 3. 19.  
Bro. Amend.  
105.  
Cro. Car. 563.  
Bro. Am. 26.  
29, 87.  
Fitz. Amend.  
17.  
1 Sid. 244,  
259.  
2 Bulst. 35.  
Dyer 346.

It was argued it might be amended, and that it was amendable first at Common Law, and secondly by the Statute of H. 6. See Amendment of an Indictment, according to a Precedent in Edward the 4th's Time; and before the Statute of Amendments, Civil and Criminal Matters were amended. Entry of an Escoin was amended; so Entry of Voucher to Warrant: And Default of Process is amendable any Time before Judgment. After Issue joined, there was a Distingas, and no Award of a Tales on the Roll, and there being a Tales on the Back of the Writ, it was amended. The Record was of such a one, Gentleman, and in the Nisi prius Roll, Gentleman was omitted, and it was amended. In Trespass, the Record was of 100 s. Damage, and the Verdict 100 l. and this Mistake was amended as a Misprision of the Clerk. On the Ven. fac. S. S. was returned, and so was the Distingas, but the Panel returned was D. S. and that Variance being moved in Arrest of Judgment, it was judged amendable; and all by the Common Law. Things of the same Nature with this were amended at Common Law; and the Statute makes no Alteration, but where it is expressly so.

Holt C. J. It is not amendable: Whatever by the Common Law might be amended in Civil Cases, was at Common Law amendable in Criminal, and so it is at this Day: But this was not amendable at Common Law, because it would warrant a Trial that was tried without

Authority

Authority, and the Amendment would be contrary to the Truth of the Fact. It is a Mistake of the Clerk in Skill, in a material Point; and tho' a Mis-awarding of Process on the Roll might be amended by the Common Law the same Term, because it was the Act of the Court, yet if any Clerk at Common Law issued out an erroneous Process on a right Award of the Court, that was never amended in any Case at Common Law.

Powel J. said, There were only two Statutes of Amendments, the <sup>14 Ed. 3.</sup> 14 Ed. 3. and 8 H. 6. the rest he reckoned to be Statutes of Jeofails: And he held that the 8 H. 6. was only to enlarge the Subject Matter of <sup>8 H. 6.</sup> 14 E. 3. which extends only to Process out of the Roll, i. e. Writs that Issue out of the Record, and not to Proceedings in the Roll it self: But that the <sup>14 Ed. 3.</sup> 14 Ed. 3. extendeth not to the King, because of these Words Challenge of the Party; and all Judges of the Law in all Ages have taken the Statute of 8 H. 6. not to extend to the Crown.

Holt C. J. further: Suppose this was immediately after the Statute of H. 6. and before any Statute of Jeofails, should it be amended? It is a good Writ, and the Meaning of that Statute was to amend bad Writs, and not to alter a good Writ, so as to adapt it to a particular Use and Purpose: Now to make this a good Trial, you would have us alter this Writ which is very good in it self, and, contrary to what is true, make it a Writ of the 23d of October; but that cannot be done, and there is no such Amendment as this between the Time of 8 H. 6. and <sup>Yelv. 64.</sup> 32 H. 8. The Tests of Writs have been amended; but it was when <sup>1 Cro. 278,</sup> Tested of a Sunday, or out of Term, &c. And I have <sup>375.</sup> always taken it, that if upon the Return of one Writ another be awarded, that other should bear Teste of the Return of the first Writ; the one must be Tested on the Day of the Return of the other, or all will be discontinued. This is a Mistake of the Clerk, and shall we look upon it to be a Fault in Point of Computation, rather than that he thought it good? And if it be Descience in the Clerk, it would not be helped even by the Statute of H. 6. tho' a Civil Case, before the Statute of Jeofails. <sup>1 Jon. 302.</sup>

And he held a new Venire must go, for a new Distringas would not do; the first Ven. fac. is executed, and the Jury have tried the Defendant, and that appears on Record, so that the Writ is ipso facto discharg'd; only an Entry is to be made on the Roll, quia apparet Cur. that the Distringas



did not issue till the 24th of October; Ideo consideratum est quod cassetur; and Ven. fac. de novo awarded.

Buxom *versus* Hoskins. Mich. 3 Ann.

( 6. )  
Mod. Caf.  
263, 310.

A Writ of Error was brought of a Judgment; and the Defendant's Scire facias to assign Errors was Quare Executionem habere non debet of a Judgment in Ejectment for two Messuages, when the Recovery was de uno Messuagio only: The Plaintiff in Error pleaded nul tiel Record, and the Defendant moved to amend.

By Holt C. J. This Sort of Sci. fac. is always to have Execution; and the Plaintiff in Error may plead to it a Writ of Error brought, and still depending, and assign Error. There is a Difference when the Writ is bad and vicious on the Face of it, and when it is good in the Frame of it, but not fitted for that particular Use, and all the Cases of Amendment are of the first Kind; and tho' there would be some Colour to Amend in this Case, if the Defendant had appeared and pleaded another Plea, or had taken no Advantage of this Slip, so as the Proceedings would have been vicious without Amendment, here he having taken Advantage of it, and pleaded Nul Tiel Record, we will not falsify his Plea by an Amendment, which was good at the Time when pleaded; and to amend would be to make a new Writ, or alter a good one, and fit it to another Purpose, and to alter the Nature of a Writ after it is returned and executed, ought not to be.

1 Cro. 162,  
163.  
2 Show. 304.

Per Cur': Wherever an Original is amendable, there a Sci. fac. is so too; but this would not be amended in an original Writ of Error, because it is a good Writ, and would well remove the Record it describes, if any such there were. The Plaintiff took out another Writ, and the Court said he might do it without getting this quashed, for if this Writ abates, then it is not the same Cause.

Tutty *versus* Kempson. Hill. 6 Ann.

( 7. )

MR. Raymond moved to amend a Scire facias against the Bail upon a Writ of Error, brought on a Judgment in the Common Pleas, where the Clerk (who had the Judgment before him, in which the Plaintiff's Name was

was James) had made it Ralph. It is plain Misprision of the Clerk, for it is Radulphus instead of Jacobus. 22 E. 4. 6. b. Brewster versus Wells, Mich. 3 Ann. There was another Case, Hill. 3 Ann. where a Scire facias was upon a Judgment, which was cited to be by 3 Ann. whereas it was Trin. 7 W. in C. B. and that was entred without any Continuance.

M. Eyre, contra: Buxham versus Hoskins, Mich. 3 W. 3. where there was a Scire facias against the Ter-tenant, and the Court refused to let them amend, because they came too late. 22 Ed. 4. 6, 8. there they came at the Return of the Writ, and not allowed to amend.

Holt C. J. This is not material; for if it be amendable at one Time, it is amendable at another. If it is amendable before the Writ, it is amendable afterwards. Judicial Writs are amendable at the Common Law.

Per Curiam: The Scire facias was amended.

Vavafor *versus* Baile. Hill. 6 Ann.

Scire facias on a Judgment, and by Mistake the Plaintiff's Name was put for the Defendant's, scil. Radulphus for Jacobus, and a Motion was made to amend, it being the Fault of the Clerk. (8.) 1 Salk. 52.

Holt C. J. The Writ doth not appear to be wrong, and there may be a Judgment that agrees with it for ought we know. The Motion was denied.

Inter Lord Pembroke and Lord Jeffreys.

An Amendment being made of a Fine and Recovery in the Grand Sessions in Wales, whereby the Lord Pembroke had lost the Benefit of a Writ of Error, he petitioned the House of Lords for a Bill to set aside the Amendment: And whether the Fine and Recovery was amendable, and the Amendments warranted by Law, was referred to the Judges. (9.) 1 Salk. 52, 53.

Et per Holt C. J. & al. The Writ of Covenant, which is an Original, is not amendable either by the Common Law, or by any Statute: Neither the Statute of 14 E. 3. Moor 571. nor the 8 H. 6. warrant such an Amendment. There is no Difference as to this Purpose between Actions Amicable and Adversary; for no Body pretends to mend a Mistake in

in a Deed it self, and yet that is as much a common Assurance as a Recovery.

A Bill was hereupon allowed in the House of Lords, but thrown out in the House of Commons.

## ANCIENT DEMESNE.

Hunt *versus* Burn.. Hill. 12 W. 3.

(1.)  
i Salk. 37.

**I**N this Case the Question was, whether a certain Manor and Lands belonging to the Plaintiff were Ancient Demesne or not?

2 E. 3. 15.  
5 E. 3. 61.  
Pasch. 9 Jac. 1.  
Rot. 3165.  
4 Inst. 170.  
Moor 285.

Holt C. J. If you plead that the Manor of D. is Ancient Demesne, you ought to aver it by the Record of Domesday, for that is the Trial of it: But if you had pleaded that such a Place was Parcel of a Manor which was Ancient Demesne, then you ought to have concluded to the Country; for Parcel or not Parcel, is triable per Pais: And it seems to me, that the other Side may traverse its being Ancient Demesne. All Lands held in Ancient Demesne, which Edward the Confessor had, were by William the 1st, called the Conqueror, Anno Regni sui vicesimo, written in the Book called Domesday, under the Title de Terra Regis; and these are all held in Ancient Demesne at this Day: But those Lands that were given away by the Confessor, and which are not written in Domesday Book under the Title de Terra Regis, are not Ancient Demesne. Tenants in Ancient Demesne are privileged as to their Persons, not as to their Estates; for if Ancient Demesne be to be tried, the Issue is whether it be Ancient Demesne or Frank-Fee? By a Recovery of the Land at Common Law, it becomes Frank-Fee for ever; but a Recovery against a Tenant is reversible by the Lord, by Writ of Deceit, &c. and where it is reversed, the Land becomes Antient Demesne again.

A Respondeas Ouster was awarded.



# A P P E A L S.

Orbell *versus* Ward. Trin. 1 W. & M.

**I**N an Appeal brought by the Plaintiff for the Murder of her Husband, against the Defendant nuper de Parochia Sancti Jacobi Westm. in Com. Midd. Gen. The Defendant in propria Persona venit, and craves Oyer of the Writ and Return; and then per A. B. Attorn. suum pleads in Abatement, that there is a Parish named St. James within the Liberty of Westminster, but no Parish named St. James Westminster only; but did not plead over to the Felony, as is usual in such Cases. On a Demurrer, it was objected, that the Defendant in an Appeal could not plead per Attornatum, but ought always to appear and plead in proper Person, and that he should have pleaded over, &c.

( 1. )  
Carthew 54.  
55, 56.  
1 Salk. 59.  
3 Mod. 266.  
Show. 47.

Holt C. J. held, That upon such a Plea in Abatement, without pleading over to the Felony, the Court ought to have been moved to enforce the Defendant to plead over, or the Plea should be refused; but that the Plea in the principal Case was not ill upon a Demurrer, for the Defendant is not obliged in such Case to plead over to the Felony, no more than a Defendant in an Appeal, who pleads a Special Bar, as a Release, &c. And it was adjudged in Parliament, in a Case where the Defendant pleaded a Pardon in Bar, that it was not necessary to plead over to the Felony. He said that the Pleading by Attorney was a Discontinuance; for the Defendant could not make an Attorney, and therefore this was a Plea by a Stranger, and in effect no Plea; and consequently it ought not to have been received by the Appellant; but the Plaintiff ought to have moved the Court for Judgment against the Defendant, as if he stood mute, and so he ought to do where the Defendant pleads in Abatement, and doth not plead over to the Felony: But the Plea being accepted by the Plaintiff, and the Matter pleaded in Abatement confessed by the Demurrer, it is good without pleading over, &c. and adjudged for the Defendant.

2 Inst. 315.  
3 Cro. 699.  
Yelv. 12.

A Discontinuance in this Action is peremptory to the Plaintiff, and so Judgment was given that the Writ should abate.

Wilson *versus* Law. Trin. 6 W. & M.

( 2. )  
4 Mod. 290,  
292.  
Skin. 443.

5 Rep. 120.  
Rast. Ent. 48.  
Co. Ent. 53.  
2 Inst. 319.

**I**N Appeal of Murder the Appellee after he had craved Oyer of the Writ and Count demurred, and as to the Felony and Murder pleaded Not guilty: And the following Exceptions were taken to the Count or Declaration. That it is said the Person killed was on the 9th Day of April, in the Peace of the King, &c. and that the Defendant circa horam primam of the same Day, ex malitia sua præcogitata eisdem die & hora assaulted him; Now circa horam primam is a very uncertain Allegation of the Time, and of consequence eisdem die & hora, &c. insultum fecit must be as uncertain. That there is no direct Charge against the Defendant; for the Words in the Declaration do not positively alledge that he gave the Wound, it is percussit, pugit & perforavit, Dans, &c. when it should have been dedit mortale vulnus, and that there is no legal Venue; for the Fact is alledged to be committed in Parochia, &c. whereas it is expressly required by the Statute of Gloucester, that it ought to be in some Vill or Town.

4 Rep. 20.

By Holt C. J. & Cur': First, By the Statute of Gloucester the Time and Place, where the Fact was committed, ought to be certainly expressed, or otherwise the Appeal shall be abated; and circa horam primam is a certain and sufficient Averment of the Time; for it is within the Compasses of an Hour. It is true, the Fact cannot be alledged to be done with such a seeming Uncertainty, as dedit plagam Mortalem circiter pectus, nor the Year or the Day, but the Hour may, because there is more Difficulty in alledging the very Hour, than the Day or the Year, which are longer Measures of Time, and therefore are more certain. Secondly, The Charge is direct against the Defendant by the Word Dans, and it had been more uncertain by the Word dedit. Thirdly, It shall be intended that the Parish is a Vill, unless it be otherwise shewed by the Defendant, and pleaded in Abatement. For tho' the Word Parochia is uncertain, because it may include divers Vills, yet that shall never be supposed, and it shall be taken to be a Vill, if the Contrary is not shewn. By the Statute of 1 H. 5. c. 5. it is ordained, that in original Writs in personal Actions, and in Appeals and Indictments, wherein Exigents may be awarded, Additions shall be made of the Estate, Degree and Mystery, and likewise of the Town, Hamlet, Place or County,

1 Inst. 125.  
22 H. 6. 41.  
35 H. 6. 30.  
Bro. Addit.  
pl. 38. 14.

County, where the Party is conberfant; and if any of these are omitted, the Writ shall abate; and yet where no Will is in a Parish, the Writ shall be good, viz. Præcipe A. de Parochia, &c. for that may be the Place where the Defendant inhabits.

Judgment to answer over.

Armstrong *versus* Lisle. Mich. 8 W. 3.

**L**ISLE was indicted of Murder, and convicted of Man- slaughter; whereupon he prayed his Clergy by a Friend, not being in Court himself; and after at the same Assizes an Appeal was lodged by the Brother and Heir of the Party killed, and the Conviction and Appeal were removed by Certiorari, and the Party by Habeas Corpus; and at the Return of the Certiorari it was moved by the Appellant, that he might file a Letter of Attorney, in which Case the Court would not make any Rule; but said that he might do it at his Peril, for if he filed a Letter of Attorney, and the Law required an Appearance in Person, the Appeal would be discontinued.

(3.)  
Skin. 670,  
671.  
1 Salk. 61, 62,  
63.  
Kelyng 93.  
89.

Holt C. J. The Appellee ought, after the Appeal returned upon the Certiorari, to sue a Scire facias against the Appellant ad prosequendum, because the Appellant has no Day in Court; and here the Chief Justice inclined, that the Court ought not to refuse to allow Clergy to one Convict of Manslaughter; but in regard of some contrary Resolutions he thought it fit to be argued; and he said that he had argued it both Ways, but never was satisfied in his Judgment with the Resolutions that had been given, that they might respite Clergy, for by this means it would be in the Power of the Judges to hang a Man.

And at the Return of the Conviction, the Appellant's Counsel took Exceptions to it; which Holt C. J. would not allow, and said that they were Strangers to this Record, and had not any Authority to take Exceptions.

At another Day, Judgment was prayed for the King against the Prisoner on the Indictment; and the Defendant being ask'd, what he had to say, why Judgment should not pass against him, Pray'd his Clergy. Et per Cur': If the Defendant had prayed it at the Sessions of Gaol-Delivery, it could not have been denied him there; now he is here, we cannot give Judgment against him, without asking what he has to say why Judgment should not be given?

3 Bull. 113.  
Styke 371.  
2 Rep. 478.

Not



Now can we deny him here, what could not have been denied him there; hereupon his Clergy was allowed him. And now it was questioned, whether the Appellee ought to be arraigned again on the Bill of Appeal? And the Court said, the Appellant must arraign the Appellee de novo, but is not to make a new Count; for the Arraignment is no Commencement, but a Reviver thereof. Upon this the Appeal was arraigned by the Appellant's Counsel, who read the Count, &c. And at last the Appellee was allowed to stand upon the old Recognizance till another Day, that he might have Time to find Bail, and to plead, and every thing to be entered as of this Day.

On the Day appointed, the Appellee pleaded the Indictment, and Conviction of Manslaughter at the Sessions of Gaol-Delivery, which was removed into B. R. and that no Judgment was thereupon given; and that at the Time of the Conviction he was and yet is a Clerk, and then prayed his Clergy, and offered to read as a Clerk, if the Court would have admitted him to it: And that afterwards scil. die, &c. last, being demanded by this Court, why Judgment should not be given against him, he prayed the Benefit of Clergy; which was allowed, and he read as a Clerk, and was burnt in the Hand, prout per Record, &c. And as to the Felony and Murder, he pleaded Not guilty: The Appellant replied, that he demanded the Appellee to plead at the Sessions of Gaol-Delivery, and that he refused; to which the Appellee Demurred. Now the Replication being held naught, the Question was upon the Bar, viz. whether a Conviction of Manslaughter, on an Indictment of Murder, and Clergy allowed thereon, could be a Bar to an Appeal precedent or concurrent with the Indictment? And the Plea in this Case was adjudged a good Bar to the Appeal.

By Holt C. J. At Common Law, auter foits Convict or acquit was a good Bar to an Appeal, for no Man's Life ought to be twice endangered for the same Offence: And so the Law would be at this Day, had not the Statute of 3 H. 7. c. 1. altered it; by which Acquit or Convict on an Indictment, is made no Plea in Appeal, unless Clergy be had thereupon; and the Words of the Statute are general, so as to extend to all Appeals, whether subsequent, antecedent or concurrent. And as for the having of Clergy, it has been held that praying of Clergy is having of Clergy within the Statute; for by praying it, the Prisoner has done all that he could: Here was indeed no regular Prayer

Staundf. 98.  
H. P. C. 190.  
4 Rep. 40.  
Kel. 94, 107.  
2 Leon. 111.

Prayer made to have Clergy at the Gaol-Delivery, because the Appellee was never called to Judgment by the Court; and if the Court will not proceed to Judgment, and ask the Party what he can say why Judgment should not be given against him, whereby he has no Opportunity to pray his Clergy, it is the Default of the Court, and not of the Party, and therefore shall not prejudice him who has done all in his Power.

A P P E A R A N C E.

Anonymus. Mich. 1 Ann.

**F**Ormerly when a Writ issued out of B. R. it was entered upon a Roll, so that tho' the Officer did not return the Writ at the Day, yet the Defendant might appear either to save a Penalty, or his Inheritance. And so they did in the Common Pleas; the Entry on the Roll being thus, viz. Dominus Rex misit breve suum clausum in hæc verba, &c. Per Holt C. J. (1.) 1 Salk. 64.

Appendant and Appurtenant.

Poole's Case. Mich. 2 Ann.

**T**enant for Years of a House made an Under-Lease to a Soap-Bosser, who for the Convenience of his Trade, put up Fats, Coppers, &c. And now upon a Fieri Facias against J. S. on a Judgment in Debt, the Sheriff took up all these Things, and left the House stripped and in a ruinous Condition, so that the first Lessee was liable to make it good; and thereupon brought a Special Action on the Case against the Sheriff, and those that bought the Goods, for the Damage done to the House. (1.) 1 Salk. 368. Co. Lit. 53 a.

1 Roll. Rep.  
216.  
Swinb. 132,  
345, 346.  
Moor 177,  
178.

4 Co. Herla-  
kenden's  
Case.  
Owen 70, 71.

Holt C. J. During the Term the Soap-Bosler may well remove the Fats he set up in relation to his Trade; and that by the Common Law (and not by Virtue of any special Custom) in favour of Trade: But after the Term they become a Gift in Law to the Reversioner.

There is a Difference between what he did to carry on his Trade, and what he did to compleat the House, as Hearths, &c. which are removeable.

The Sheriff may take them in Execution, as well as the Under-Lessee might remove them: And so this is not like Tenant for Years without Impeachment of Waste. In that Case the Sheriff could not cut down and sell, tho' the Tenant might, because in that Case the Tenant hath only a bare Power, without an Interest; but here the Under-Lessee hath Interest, as well as Power.

## APPRENTICES.

Hobbs *versus* Young. Hill. 1 & 2 W. & M.

(1.)  
Carthw 162,  
163.  
3 Mod. 313.  
1 Show. 267,  
268.

**A**N Action Qui tam was brought against the Defendant on the Statute of 5 Eliz. c. 4. for using the Trade of a Clothier, not having been Apprentice to that Trade; and a Special Verdict was found, viz. that Young the Defendant was a Turkey Merchant, and exported great Quantities of English Cloth into the Levant; and that for this Purpose only he hired several Clothworkers, who had all been Apprentices to the same Trade, and kept also a Master-Workman of the Trade to inspect their Work; and by these Men he made great Quantities of Cloth, all which he transported; and that he kept a Dye-House, and hired Men of that Trade to Dye his own Cloths, and no other, &c. The Question was, whether this Case was within the Intent of the Statute, so as to restrain the Defendant to exercise a Trade by his Servant, to which he himself had never been an Apprentice?

Per Holt C. J. If it had been found, that the Defendant exercised this Trade by himself, it had been within the Statute, tho' it was for his own Merchandise only; and the doing it by Servants, is the doing of it himself,  
and



and the Workmen are no Traders, but his Servants, for he only is properly the Tradesman who hath the Profit and Benefit of the Trade, and not he who is the Hiring, that hath nothing either in the Gain or Loss: And he held, that if a Coachmaker keeps Servants to make his Wheels, and Workmen to curry his own Leather. this is against the Statute, because it is he only that receives all the Profits of the several Trades; and the Wheelwright and the Currier are but his Servants. If a Man keeps Journeymen Shoemakers, to make Shoes for Transportation, this is an Exercising the Trade of a Shoemaker within this Statute.

Nov 133.  
2 Bull. 187  
11 Rep. 53.  
Cro. Car. 347.  
516.  
1 Sand. 10.  
1 Sid. 303.

It was adjudged in this Case, that the Statute doth not restrain a Man from using several Trades, so as he had been an Apprentice to all; wherefore it indemnifies all petty Chapmen in little Towns and Villages, because their Masters kept the same mixed Trades there before them. And the Court agreed, that the Using a Trade in a private Family, for the Use of the same Family; was not within the Statute.

8 Rep. 130.

If a Son be employed by the Father in his Trade for several Years, he may lawfully use that Trade, for that he hath been quasi an Apprentice to it, which is sufficient to satisfy the Statute.

Judgment was given for the Plaintiff by three Judges, dissentiente Dolben.

*Peck's Case.* Mich. 10 W. 3.

**T**HE Master took an Apprentice in Husbandry, according to the 5 Eliz. and died before the Time of the Apprenticeship expired, leaving the Apprentice impotent and a Cripple; and the Justices of Peace at their Sessions ordered the Executor of the Master to keep the Apprentice; But the Order of the Justices was quashed in B. R. because it did not appear that the Executor had Assets; or that he lived in the same County.

(2.)  
1 Salk. 66.  
3 Salk. 41.

And Holt C. J. said, That by the Custom of London in these Cases, the Executor shall put the Apprentice to another Master of the same Trade; and in other Places, it would be hard to construe the Death of the Master to be a Discharge of the Covenants: That it had been held the Covenant for Instruction failed, but that he still continues an Apprentice with the Executor quoad Maintenance.

1 Lev. 177.  
1 Sid. 216.

The

The Executor is liable in Covenant, if he doth not instruct the Apprentice, or find him another Master.

The King *versus* Slaughter. Hill. 11 W. 3.

( 3. )  
2 Salk. 611.

**A**N Indictment on 5 Eliz. c. 4. for using the Trade of a Fellmonger, not having been an Apprentice seven Years, was moved to be quashed; and the Counsel urged, that this was a Business required no Skill, for it was only to pull the Wool from the Skin. And cited the Case of an Information for exercising the Trade of a Woolcomber, quashed: And for exercising the Trade of a Hempdresser, reversed.

1 Cro. 499,  
Pasch. 4 Jac.  
2.

Holt C. J. If in the Indictment it be averred to be a Trade at the Time of making the Statute, it ought not to be quashed; for whether it was a Trade then or no, or whether any Skill be requisite to the Exercise of it, are Matters of Fact proper for the Trial of a Jury; and there are many Trades within the general Words and Equity of that Act, besides those that are mentioned in it: But if it be not averred in the Indictment, that the Trade therein mentioned was a Trade at the Time of making the Statute, it would be a good Exception.

The Court would not quash the Indictment.

Dillon's Case. Eod. Term.

( 4. )  
1 Salk. 67.

**I**N this Case, Holt C. J. & Cur. adjudged, that Justices of Peace may Discharge an Apprentice, and also order a Restitution of the Money given with the Apprentice within the Equity of the Statute of 5 Eliz. And that if the Master, being bound to answer at the Sessions of the Justices, do not appear, it is a Forfeiture of his Recognizance; but the Justices may at the same Time proceed to make an Order against the Master.

Fitz-Hugh *versus* Dennington. Mich. 3 Ann.

( 5. )  
Mod. Caf.  
227, 259, 260.

**A** Writ of Error was brought of a Judgment in the Marshalsea Court in Debt upon a Bond, where the Defendant craved Oyer of the Condition, which recited, that the Plaintiff was become an Apprentice to the Defendant

pendant for seven Years; and then the Condition was, that if the Defendant, at the End of the said Term, should make, procure, or cause the Plaintiff to be made Free of the Company of Joyners of London, if thereunto requested, then the Obligation to be void. To this the Defendant pleaded, that at the End of the said seven Years, or after, till the Time of the Action brought, he was not requested: The Plaintiff demurred, and Judgment was had for the Plaintiff below. For supposing the Request not material at all, or at least if it were so, the Plea of the Defendant should have been, That he never was requested; and not to tie it up to a Request at the End of the seven Years, or after, for the Plaintiff might have requested before the End of the Term to make him free at the End of the seven Years.

By Holt C. J. The Request is material here, and must be when the Condition could be performed, and not before; for it cannot be intended one would request a Thing to be done, before it was to be, or could be done. The Defendant was to make the Plaintiff Free at the End of seven Years Apprenticeship, if thereunto requested; and he pleads that at the End of seven Years he was not requested; surely this is a good Plea, for it is directly the Words of the Condition. And what shall be understood to have been meant by the End of seven Years, whether after they are expired, or just at the End of them, so as he ought to be made free on the last Day of the seven Years? Now when a Man is to do a Thing by such a Time, if requested, there if the Thing in its Nature may be done at the Time of Request, the Request is to be made on the last convenient Part of that Time. As if a Man be bound to pay a certain Sum of Money on Lady-day, if requested; in such Case the Request must be on the last convenient Time before Sun-set of that Day, on which such a Sum may be paid. And he took it clearly, that the Request here should have been on the last most convenient Time of the last Day of the seventh Year: And that it was the same thing, as if Lessee for Years covenant to leave all Things in good Order, and to vacate the Premises at the End of his Term, he must do it on the last Day, and cannot save his Covenant by doing it the Day after; for the End of a Thing is Part of that of which it is an End.

Powel Just. The End of seven Years must be the last convenient Time; and it is like a Demand, which is to be at such Time as the Thing may be done on: If you had

T

come

1 Lev. 68.  
Aley 25.  
Yelv. 66.  
Style 49.  
1 Cro. 179.  
2 Cro. 183.  
652.  
1 Sand. 33.



come and said, That the Defendant was a great Way off on the last Day, it had been something.

The Judgment was reversed.

## A R R E S T S.

Mich. 1 Ann.

( 1. )  
Farr. 52.

**C**omplaint was made to the Court, that a Man was arrested in Trinity Term, by Virtue of a Writ returnable in Easter Term, and a Bail-Bond taken for Appearance at the Time of the Return of the Writ.

1 Sid. 229.  
3 Cro. 180,  
408.

Per Holt C. J. If one be arrested after the Return of a Writ, false Imprisonment lies against him that doth so arrest the Party : And there is good Matter to plead against an Action upon the Statute of 23 H. 8. The Fact was referred to the Master to Examine, in order to punish the Officer for Oppression.

If a Person, against whom there is a Judgment of this Court, be seen to walk in Westminster-Hall, we may send our Officer to take him up, if the Plaintiff desire it, without a Writ of Execution.

## ARREST of JUDGMENT.

Anonymus. Pasch. 11 W. 3.

( 1. )  
1 Salk. 77, 78.

**A**n Indictment for a Misdemeanor was tried three Days before the End of the Term, and Judgment entered the same Term, so that the Defendant had not four Days to move in Arrest of Judgment : And the Question was, whether this Entry of the Judgment was regular, or that it should have been stayed till the Term following ?

Holt C. J. If there be four Days and more between the Trial and the End of the Term, Judgment ought not to be

be entered within the four Days; but if the Distringas be returnable within the Term, and the Party is tried within two or three Days before the End of the Term, the Judgment shall be entered that Term, tho' there be not four Days to move in Arrest of Judgment.

Wood *versus* Shepherd. Trin. 2 Ann.

**T**O move in Arrest of Judgment, one ought to give Notice to the Clerk in Court of the other Side; but the better way is to give a Rule upon the Poslea for bringing it into Court, for that is a Notice of it self. (2.) Mod. Cas. 145.

And Arrest of Judgment is either for intrinsic Patter, appearing by the Record it self, which will render the Judgment Erroneous; or it is extrinsic, that is, some foreign Patter suggested to the Court, which proves the Writ is abated: And the old Practice of taking Advantage in Arrest of Judgment was thus: The Party after a general Verdict, having a Day in Court, did assign his Exceptions in Arrest of Judgment by way of Plea; and it was called Pleading in Arrest of Judgment: This differed from moving in Arrest, which was done by one *as amicus Curie* where the Party was out of Court.

21 H. 7. 57.  
Velv. 125.  
1 Bulst. 5.  
Rast. Ent. 47.  
Co. Ent. 57.  
Co. Ent. 295.  
2 Roll. 7. 6.  
9 Ed. 4. 11.

## A S S E T S.

Kellow *versus* Rowden. Pasch. 2 W. & W.

**W**Kellow, Executor of E. Kellow, brought an Action of Debt on a Bond against R. Rowden, Son and Heir of J. Rowden his Father; and declared upon a Bond of 120 l. made by the Father of the Defendant to the Testator of the Plaintiff. The Defendant pleaded *Riens per descent de prædict*. J. Rowden Patr. suo, on the Day of the Writ purchased, nor at any Time afterwards; upon which they were at Issue: And the Jury found a Special Verdict, that J. Rowden the Obligor had Issue C. Rowden his eldest Son, and R. Rowden the Defendant; and that he was seised in Fee of a House and ten Acres of Land, which he settled by Deed (1.) Carthew 126, 127, 128. 3 Mod. 253. 3 Lev. 286.

Deed to the Use of himself for Life, Remainder to his eldest Son C. Rowden in Tail, Remainder to his own right Heirs, and died; that C. Rowden was seised in Tail, with a Remainder in Fee expectant, &c. And that he had Issue H. Rowden, and died; that he the said H. Rowden was seised ut supra, and afterwards died without Issue; after whose Death the Premises descended to the Defendant R. Rowden in Fee, as Heir of H. Rowden the Grandson, and also Heir of J. Rowden the Obligor, by Virtue whereof he entered, and was seised, &c. The Question upon this Special Verdict was, whether on the latter thus found, the Declaration of the Plaintiff was good, or not, because he had declared against the Defendant as immediate Heir of the Obligor, without mentioning the intermediate Descents; and it was insisted that this Declaration ought to have been Special, shewing how the Defendant became Heir to the Obligor, to charge him with this Debt, and the Assets by Descent.

F. N. B. 220.  
2 Rol. Abr.  
400.  
Dyer 136.  
Cro. Car.  
151.  
40 Ed. 3. 10.  
1 Inst. 239.

By Holt C. J. The Declaration is good; the Reversion in Fee being now come into Possession, and the Defendant hath the Land as Heir to his Father; and thereupon the Plaintiff had Judgment. It was agreed by all in this Case, that a Reversion expectant upon an Estate-Tail, is not Assets to charge the Heir upon the General Issue Riens per Descent: But the Chief Justice said, a Reversion expectant upon the Determination of an Estate for Life is quasi Assets, and ought to be pleaded Specially by the Heir; and the Plaintiff in such Case may take Judgment of it cum acciderit.

Dyer 371.

Judgment for the Plaintiff. 1 Show. 249.

### Gree *versus* Oliver. Trin. 4 W. & M.

( 2. )  
Carthew  
245, 246.

**I**N Judgment tried before the Lord Chief Justice Holt, at the Assizes in Exon, brought by the Plaintiff, on a Special Judgment against the Assets confessed by the Heir, &c. The Question was, If a Judgment against an Heir, upon Assets confessed, shall bind the Lands from the Time of the Judgment given only, or shall relate to the Time of the original Writ or Bill filed?

Holt C. J. This Special Judgment against the Assets only, shall have Relation unto, and bind from the Time of the Filing the original Writ or Bill: And the Filing a Bill in B. R. is as effectual for this Purpose as an original



ginal Writ. Indeed a general Judgment against the Heir, where the Execution is a common Execution by Elegit, and not against the Assets only by Extent, will not operate by way of Relation to the Original; but binds only, in common Cases, from the Time of the Judgment given.

ASSIGNEES.

Pitcher *versus* Tovey. Mich. 3 W. & M.

**E**rror on a Judgment in C. B. in Action of Covenant against an Assignee of a Term for Years, for Rent incurred after his Assignment over to another, without Notice to the Lessor; and there Judgment was given for the Plaintiff, That an Assignment by an Assignee without Notice, was not good. (1.)  
1 Show. 340,  
341.

Holt C. J. What makes the Assignee chargeable, is the Estate; and he hath nothing to do with the Lessor, but upon that Account. A Bargainee of a Reversion shall maintain Debt for Rent from the Time of the Bargain and Sale, tho' there were no Notice to the Lessee; and there is the same Reason on the other Side. The Assignee hath the Estate, without the Consent of the Lessor; and why may he not part with it again? The Case of Buckley and Keiley was agreed; and Hale was of another Opinion afterwards in the Exchequer-Chamber: Here the Judgment was reversed, for that no Notice is necessary. 2 Sid. 328.

Richards *versus* Turvy. Pasch. 4 W. & M.

**E**rror on a Judgment in C. B. The Case was, A. demised to B. reserving Rent, with a Covenant to pay it; B. enters, and assigns to C. who covenants to pay the Rent, and there was an Indorsement of a Covenant to pay twelve Bottles of Sack. A. brings Covenant against C. C. as to Part of the Money and Part of the Sack, confesseth it, &c. and as to the Residue, pleads an Assignment over to D. before it became due. Judgment in C. B. for A. (2.)  
Com. 192.  
Covenant  
against an  
Assignee of  
an Assignee.

A. by C. J. Pollexfen and Rookby, Powel dissentiente, and Ventris agrotante.

Holt C. J. Assignment by Assignee dischargeeth him, because he was only chargeable as having the Land: and there is no more Reason for his giving Notice to the Lessor of his Assignment over, than of the Assignment to him by the Lessee.

Dolben and Eyres agreed, and (absente Gregory) the Judgment was reversed.

Midgley & Gilbert *versus* Lovelace. Trin. 5 W.  
& M. Rot. 625.

(3.)  
Carthew  
289, 290.

**K**Eightley demised a House to Jones for a Term of Years, rendering Rent; Jones assigned the Term to the Defendant Lovelace, and Keightley by his last Will devised a moiety of the Reversion unto Midgley, and the other moiety to Gilbert, and died, and now Midgley and Gilbert join in an Action of Covenant, and assign the Breach in Non-payment of the Rent. The Defendant pleads, that after the Rent became due, and before the Action brought, the Plaintiffs had by Fine, &c. granted Reversion to one Hawkins; and concluded in Bar; upon a Demurrer to this Plea, there were two Questions:

(1.) Whether the Plaintiffs ought to sever in this Action, or in an Action of Debt for this Rent, because they are not Joint-Lessors, but have each a several Interest to a moiety of the Reversion? To which it was resolved, that the Plaintiffs are Tenants in Common, and may join or sever (at Election) in an Action of Debt for Rent reserved.

Sid. 402.  
CONTRA.

But by Holt C. J. If they sever in Debt, &c. they must not each make his Demand of such a certain Sum, which amounts to a moiety; but the Demand must be de una medietate of the whole Rent; and therefore if they may join in Debt, they may likewise join in Covenant.

The other Question was, whether the Arrears of Rent are not lost to the Plaintiffs by their Granting the Reversion to another, because the Privity between them and the Defendant was thereby destroyed? It was resolved, that this Action was maintainable for the Arrears of the Rent, notwithstanding the Reversion was out of the Plaintiffs; for the very Privity of Contract was transferred by the Statute of H. 8. which gives the Action for and against Assignees

1 Sid. 157,  
402,  
Raym. So.

signees, tho' the Privity of Estate is gone. And since Debt will lie in this Case, a fortiori Covenant, &c.  
Judgment for the Plaintiff.

Parker *versus* Webb.

A Lessor being seized of Lands in Fee, made a Lease thereof for Years to the Defendant, rendering Rent at Lady-day and Michaelmas, in which Lease the Defendant covenanted to pay the Rent, &c. afterwards the Lessor granted the Reversion to the Plaintiff, to which Grant the Defendant attorned: And now an Action of Covenant being brought against him for Non-payment of Rent, he pleaded, That he had assigned his Term to B. D. before the Grant of the Reversion to the Plaintiff: To which Plea the Plaintiff demurred. ( 4 )  
3 Salk. 5.

By Holt C. J. The Plea is not good; for the Defendant in this Case ought to have set forth, that the Plaintiff had accepted Rent from the Assignee, or that he had Notice of the Assignment: But if that had been pleaded, the Plaintiff should still have Judgment, because being Grantee of the Reversion, he may maintain this Action against the Lessee, even after the Assignment of the Lease, and tho' he had then accepted the Rent; and this he might do on the Lessee's express Covenant to pay it, which runs with the Land. 3 Lev. 233.  
1 Sid. 338,  
339.

Buck *versus* Barnard.

A Debt for Rent, brought against the Administrator of the Lessee; it was held by Holt C. J. that an Administrator is chargeable as Assignee, for the Time he enjoys and is in Possession of the Premises: And the Declaration was ( 5 )  
1 Show. 348.

Judgment for the Plaintiff.



## ATTORNEY.

Lacker *versus* Harcourt. Pasch. 2 W. & M.(1.)  
1 Show. 148.

**C**ase against the Defendant laid in Somersetshire, moved to change the Venue upon the Account of the Defendant's Privilege, as an Attorney and Clerk in Court, and to have it laid in Middlesex, and shewed several Rules wherein it had been done, and urged the Practice for it, and the Reason of that Practice, viz. their supposed constant Attendance on the Court here; but denied by Chief Justice Holt, et ceteros tacentes; for that they have no such Privilege. For the Plaintiff in a Transitory Action may lay it where he pleases; but if an Attorney be Plaintiff in a Transitory Action, and lays it in Middlesex, the Defendant shall not change the Venue upon the common Affidavit.

Anonymus. Mich. 5 W. &amp; M.

(2.)  
Skin. 404.

**A**t Nisi Prius in Westminster, an Attorney who had drawn an Indenture of Agreement between a Sheriff and his Under-Sheriff, being produced to prove a corrupt Agreement between them, was not compelled to discover the Matter of it, tho' he was not a Counsellor.

And per Holt C. J. It seems to be the same Law of a Scrivener. And he cited a Case where, upon a Covenant to convey, a Counsel shall advise, and that Counsel did not advise, being pleaded; Conveyances made by the Advice of a Scrivener being tendered and refused, was allowed to be good Evidence upon this Issue. For he is a Counsel to a Man who will advise with him, if he be instructed and educated in such Way of Practice; otherwise of a Gentleman, Parson, &c.

Anonymus. Mich. 10 W. 3.

Per Holt C. J. **W**here an Attorney takes upon him to appear, the Court looks no farther; but takes it that the Attorney had sufficient Authority; and leaves the Party to his Action against him. (3.)  
1 Salk. 86.  
5 Mod. 205.  
6 Mod. 16,  
40.

Withers and Harris. Mich. 1 Ann.

Holt C. J. **Y**OU cannot change your Attorney without Leave of the Court, to be obtained on Motion, tho' he be ever so great a Cheat. (4.)  
Farrell. 50.

If an able and responsible Attorney appear for any Person without a Warrant, and Judgment is had against him, the Judgment shall stand, and the Party be put to his Action against the Attorney; but if the Attorney be in bad Circumstances, the Court will set the Judgment aside. Mod. Caf. 10.

And if an Attorney will take a Man's Money to do Business, and does not do it, we may enter into a Summary Examination of the Matter; and if we find him refractory, he may be struck out of the Roll. Mod. Caf. 187.

Audita Querela. See Error.

## AUTHORITY.

Dixon and Smalley. Hill. 5 W. & M.

**A**T Nisi Prius in Guildhall, it was ruled by Holt C. J. that where the Mayor and Commonalty of London had constituted J. S. their Bailiff to receive their Rents, and to make Demand of them, and to make Entry, upon Evidence upon Obedient, such general Authority is not sufficient to authorize a Bailiff to take Advantage, and make Demand of a Rent accrued due after the Authority given: For it is a new Right attached, and there ought to be special Authority for this Purpose. Skin. 417.

## A W A R D S.

Forster *versus* Brunett. Mich. 1 W. 3.( 1. )  
1 Salk. 83.

**A**Djudged, That for not performing an Award made upon a Rule of Court, Attachment lies not without a personal Demand.

And Holt C. J. said, He remembered the first Attachment of this Kind in the Case of Sir John Humble, in Kelyng's Time, in which, and ever since, a personal Demand had been thought necessary. In such Cases of Awards, tho' they be not legally good, Attachment may be had for Non-performance; but 'tis otherwise if they are impossible.

Bacon *and* Dubarry. Trin. 9 W. 3.( 2. )  
Com. 459,  
440.  
1 Salk. 70.

**D**EBT upon a Bond of 600 l. conditioned that where-as several Differences were moved between the Plaintiff Bacon and the Defendant, as Attorney to Durutter, if the Defendant, on the Part of Durutter, should stand to the Award of A. B. and C. then the Bond to be void. The Defendant pleads *Nul agard fait*; the Plaintiff sets forth an Award, that the Defendant, for and on the Behalf of Durutter, should pay to the Plaintiff 345 l. 6s. 10d. and that Plaintiff and Defendant, *ex parte* Durutter, should seal and deliver mutual Releases, *ad usum alterius eorum*, of all Matters relating to the said Accounts, and assigns a Breach that the Money was not paid: The Defendant demurred. And it was resolved, 1. That the Submission is clearly good. For a Man may bind himself, as Attorney to another, to stand to an Award of all Differences between his Principal and another; and if the Principal doth not perform it, the Attorney forfeits his Bond; (so for an Infant.) 2. That this Award is void, for here is nothing to be done by Bacon, for and on Behalf of Durutter; the Release given by Bacon to Dubarry will not discharge Durutter; it should have been awarded to Durutter, it might have been said to be delivered to Dubarry. The Court at first inclined to understand it, that the Release should be made to Dubarry, for the



the Benefit of Durutter, but these Words ad usum alterius eorum tie it up.

Judgment for the Defendant.

Freeman *and* Barnard. Trin. 9 W. 3.

**A** Stumpsit upon an Agreement for the Delivery of Fifteen (3.)  
Bags of Hops at 34 s. per C. at a Day certain, laid Com. 440,  
by way of mutual Promises. The Defendant pleads in 441.  
Bar an Award, whereby the Plaintiff and Defendant were 1 Salk. 69.  
to give each other mutual Releases, and that the Defen-  
dant was always ready to have executed a Release to the  
Plaintiff, &c. the Plaintiff demurs.

Exception was taken to the Plea; for that the Defen-  
dant doth not say he hath performed his Part, but that he  
was always ready.

For the Defendant it was said, that there is a Difference  
between an Award and an Accord; the former may be  
pleaded without actual Performance, but not the latter.  
Dy. 75. b. Where a Time is limited by the Award, per-  
haps it is necessary to plead Performance; but where no  
Time is limited, then if it be done upon Request, the Request  
must precede; so it is sufficient to say always ready. 45 E. 3.  
16. 7 H. 4. 30, 31.

Holt C. J. Either it must be done in convenient Time,  
or during Life, unless hastened by Request; if the latter,  
'tis sufficient to say semper paratus; but if the former, then  
you ought to plead a Tender. Anciently, if Money was  
awarded it was held a good Plea without Performance,  
because the Party had Remedy for the Money; but if to do  
a collateral Act, then 'twas held no Plea without Perform-  
ance, because no Remedy; but now it is held, that a mu-  
tual Submission implies a mutual Promise, (an Action upon  
mutual Promises was not anciently found out.) I have  
known Actions upon such Arbitraments, and Rule of Court,  
good Evidence; if the Submission be by Deed, the Award  
itself is sufficient for a collateral Matter. There is a Dis-  
ference between Awarding a Sum of Money, or a Horse, in  
Satisfaction, and the Awarding the Release of an Action;  
the one raiseth a new Duty, with a Remedy for it; the other  
only orders a Method to discharge the Action, which the  
very Award would do, if so intended; but here must be Roll. 259.  
something more, viz. a Release before Action discharged.

He

He inclined pro Quer. but said it is a frivolous Action; for the Plaintiff should have given or tendered a Release, and must answer Damages in another Action for not doing it, tho' he recover in this.

Judgment was given pro Quer.

Anonymus. Pasch. 10, & Mich. 12 W. 3.

(4.)  
1 Salk. 71.  
1 Lev. 174.  
235.

By Holt C. J. **I**F an Award is made by Rule of Court, it shall not be set aside; unless there was Practice with the Arbitrators, or some Irregularity: And you shall not except against the Formality of it, but shall perform it. Also where a Matter is referred to Arbitrators on Rule of Court, and they make their Award, we will compel a Performance of it as much as if the Award were a Part of the Rule.

And when there is a Submission of Matters to two Arbitrators, so as they make their Award before Midsummer-day; and if they cannot agree, then to such Umpire as they shall chuse, so as he make his Umpirage before the said Day, and an Umpire is chose accordingly, this and his Umpirage will be good; because the Arbitrators had determined their Power before the said Time, by chusing an Umpire: But if the Umpire be named in the Submission, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award in be expired.

1 Salk. 70.  
2 Saund. 133.  
1 Roll. Abr.  
261.

In the Case of Reynolds and Grey it was held, That if Arbitrators chuse an Umpire before the Time allow'd for their Award is expir'd, it is void.

Foreland *versus* Marygold. Trin. 13 W. 3.

(5.)  
1 Salk. 72, 73.

**D**Ebt upon a Bond to perform an Award; the Defendant pleads no Award made; the Plaintiff replies, and sets forth an Award, with a Profert in Cur. and there were material Omissions. The Defendant craved Oyer, and demurred for the Variance between the Award set forth in the Replication and the Oyer.

1 Lev. 132.  
1 Keb. 738.  
1 Sid. 161.  
3 Lev. 24.

Holt C. J. In Debt upon a Bond to perform an Award, if Nul agard fait be pleaded, and the Plaintiff replies an Award, &c. and Issue is thereupon, if there is a material Variance between the Award given in Evidence, and the Award set forth in the Replication, it is against the Plaintiff;

tiff; but if the Variance be only by Omission of that which is void, that is not a material Variance; here the Variances are by Omissions that are material, therefore Judgment must be for the Defendant. Note also, if the Plaintiff had not made a Profert, the Defendants should have pleaded Nul tiel Agard.

*Morris versus Reynolds.* Pasch. 2 Ann.

**T**HE Defendant moved to set an Award aside, because the Arbitrators went on without giving him Time to be heard, or produce a Witness. (6.)  
1 Salk. 73.

And Holt C. J. denied the Diversity, 1 Salk. Arbitrament Pla. 4. He said, The Arbitrators being Judges of the Party's own Chusing, he shall not come and say, they have not done him Justice, and put the Court to examine it. Aliter where they exceed their Authority. However the Award was examined, and confirm'd; and the Plaintiff moved for an Attachment for not performing it. And the Court held that the Non-performance, while the Matter was sub judice, was no Contempt. Then the Plaintiff moved for his Costs, and that was denied. Upon which Powell J. said, that seeing they could not give Costs, he should never be for examining into Awards again. 3 Keb. 446.

*Squire versus Grevil.* Mich. 2 Ann.

**W**RIT of Error was brought of a Judgment in C. B. in Action of Debt on a Bond, for Performance of an Award. The Plaintiff, after Nul Award pleaded, set forth an Award on such a Day, reciting several Suits depending between the Parties, and a Submission of all Matters pending; and 1. The Arbitrators award, That all Suits between the Parties shall cease. 2. That the Defendant should pay the Plaintiff 10 l. in full of all Demands, and also give him a Release from the Beginning of the World to the Time of the Award made. 3. That upon the Receipt of the 10 l. the Plaintiff should make a Release to the Defendant from the Beginning of the World to the Time of the Award. Exceptions were taken by Counsel to this Award, that it was not final, for it is only that all Suits depending shall cease, &c. and it is in the Plaintiff's Election whether he will make any Release or not; for the Release is order'd to be made upon Receipt of the 10 l. and it



is not awarded that he shall receive it, and if he refuse, he is not bound to release.

Style 481.

388.

Dyer 356.

1 Lutw. 224.

Co. Lit. 289.

2 Roll. Abr.

404.

1 Danv. Abr.

1.

Cro. El. 14.

161.

Holt C. J. It has been held, That where a Thing is agreed to be done upon Payment and Receipt of Money, that Tender of the Payment and Refusal intitles the Party to it as much as an actual Payment: And as to the Point, That all Suits pending between the Parties should cease; the Question is, whether this goes to the Cause of Action? If a Man releases his Action, and has no other Remedy for his Right but an Action, does not that discharge the Right of the Thing? Now here is an Action depending, and if a Person release that Action, he thereby releases the Right of Action; and by the same Reason Releasing and Determining Suits determines the Right of the Thing, because there is no Remedy but by Suit; therefore this Award is final. And here the very Awarding a Sum of Money, is a Bar of Actions; for by the awarding Money to the Plaintiff, a Duty thereby arises and vests in him, which is a good Bar, wherever Accord with Satisfaction is a good Plea: 'Tis true, antiently it was taken, That if the Thing awarded were not Money, but the doing of some collateral Act, the Party to whom it was awarded was without Remedy, and consequently such Award would be void. But the contrary hath been adjudg'd since, for if two Men submit to the Award of a third Person, they Two do also thereby promise expressly to abide by his Determination, and agreeing to refer is a Promise in it self; and where a Sum of Money is order'd to be paid, it is immediately a Duty, and if there were no more than an Award to pay a Sum of Money in Satisfaction of all Demands, it would be final.

Judgment affirm'd per Cur'.

*Oates versus Bromell.* Pasch. 3 Ann.

(8.)  
Mod. Cases  
160, 176.

**I**N Debt upon a Bond for performing an Award, ita quod it were made and ready to be delivered to the Parties by such a Day: Nul Award was pleaded, and a Parol Award set out, and averr'd to be ready to be delivered. On Demurrer, it was insisted, that the Words, ready to be delivered, necessarily import, that the Award was to have been in Writing.

Per Holt C. J. There are two distinct Things to be done: The making the Award; and to be ready to deliver it

it to the Parties. If it had been, so as the said Award be ready to be delivered, it might be well; and if it were in Writing, it would suffice to say, That it was made; for what is made in Writing, then is ready to be delivered, because it is then deliverable: But we are to judge, whether a Parol Award be properly deliverable; or if we shall not understand the Meaning of the Words, ready to be deliver'd, to be a Delivery in Writing: And he and the Court were then of Opinion, that it should be so understood. But at another Day, having seen a Case in Dyer, which was a strong Authority for the Plaintiff, as to the Delivery of Parol Matter, he said that the Award might have been made behind the Parties Backs, and deliver'd, viz. pronounc'd over again to their Faces; and if so, what may be delivered, may be ready to be delivered. 2 Cro. 541.

And per Cur', A Parol Award is capable of a Delivery; viz. a Declaration of it to the Parties: There may be an oral Delivery in this Case. Dyer 218.  
Co. Ent. 126.

Judgment was given for the Plaintiff.

## B A I L.

The King *versus* Yates. Hill. 2 W. & M.

**T**HE Defendant was committed to the Prison of Hull, and 'twas mov'd to have his Prayer entered, because it was for Treason, that he might be tried, &c. Per Cur', You cannot make a Prayer here, because 'tis to be for the next Assizes for the Place. (1.)  
1 Show. 197.

'Twas urg'd, That 'twas in the Disjunctive, and the Prisoner might make his Prayer, either the first Day there, or the first Week here.

But per C. J. Holt, It must be taken respectivè, for otherwise all the Felons in all the Gaols of England must be discharged.

Then 'twas urg'd, That the Treason laid to the Prisoner's Charge was done on the Sea, or beyond the Sea, viz. sending Lead to France, and might be tried where the King pleased. So the Prisoner was bailed.

The

The King *versus* The Lord Mohun. Mich. 9 W. 3.

( 2. )  
Skins. 683,  
684.

**T**HE Lord Mohun having been bailed by Holt C. J. appear'd on the last Day of the Term; and being in Court, it was pray'd that he might stand committed, for there was an Indictment of Murder found against him by the Grand Jury: This was oppos'd by his Counsel, who argued that as he was bailed by the Chief Justice, and he had all the Informations before him, and the same Witnesses being sworn upon the Indictment, as upon the Inquisition before the Coroner, there was the same Reason for him to stand upon the first Bail, as there was at first to admit him to bail.

To this it was answer'd, that there was a Difference between an Inquisition found before a Coroner, where the Depositions are in Writing and examinable, and an Indictment of Murder found by a Grand Jury, where the Evidence is secret, and they are sworn not to discover it; and there may be more Evidence given to a Grand Jury, than was given to the Coroner, and more may be also given upon the Trial, than was given to the Grand Jury.

The Court committed him; and said, that if the Lords in Parliament, which were to sit in two or three Days, thought fit of it, they might remove the Indictment by Certiorari, and admit him to Bail there.

Rex *versus* Earl of Aylesbury. Hill. 9 W. 3.

( 3. )  
Com. 420,  
421.

**H**E prayed by his Counsel, that he might be bailed, having entred his Prayer the first Week of this Term, he was committed in March last, but the Habeas Corpus Act was suspended by a late Statute till Septemb. 1. and by another Statute till Decemb. 1. so that he could not enter his Prayer sooner; and per Cur', when the Power of the Court was taken away from Bailing, it was not necessary to enter his Prayer, because to no Purpose. If he does not make his Prayer the first Term, when the Law is open, he cannot do it afterwards upon the Habeas Corpus Act; but when the Act is suspended, it must be understood, that he must do it the first Term after the Suspension determin'd.



Holt C. J. This is not like a common Affidavit for putting off a Trial, if it be pursuant to the Habeas Corpus Act, it sufficeth; but several Affidavits being read of my Lord's Indisposition, and the Danger of his Health: Per Cur', It is reasonable to bail him, upon the Power which the Court hath at Common Law, he having lain so long, his Health being in Danger, and it not appearing when the Witness will return. And accordingly he was bound in 10000 l. and his four Sureties 5000 l. each, for his Appearance the first Day of the next Term.

*Carrill versus Cockran.* Pasch. 11 W. 3.

THE Question upon Motion was, Whether they (4.) would hold the Defendant to Special Bail, in a Special Assumpsit for Money won at Play; and Turton and Gould seemed to incline they should not give him better Security than he was willing to take at first. Cases W. 3. 295.

But Holt said, They never ought to enter into the Merits of a Cause upon a Question about Bail; for to order common Bail upon Merits, would slur a Man's Cause of Action; and no Man ought to have his Cause tried with Disparagement upon it; and tho' this may be for Money won at Play, yet it was a lawful Contract which the Act of Parliament allowed of; and no Man ought to be wiser than the Law; and to say, that because he depended upon the Defendant's Word at first, he therefore should have no Special Bail, would be a Reason why there should be no Special Bail in any simple Contract. And here Special Bail was ordered; and it was said to be so ordered in like Cases in Common Pleas.

*Anonymus.* Mich. 11 W. 3.

IF the Plaintiff sue the Bail-Bond, he cannot refuse the same Persons to be Bail to the original Action: But if he proceed against the Sheriff by Amerciaments, he is not compellable to accept those Persons that are Sureties to the Sheriff to be Bail to his Action. So if a Cause be removed by Habeas Corpus out of the Marshalsea, or other inferior Court, and the Bail there offer to be Bail here, he is compellable to take them, because he did not except to them below; aliter where a Cause comes out of London, (5.) i Salk. 97. Far. 62.

Mod. Cases  
122.

for there the Clerk is responsible to the Plaintiff, for the Sufficiency of the Bail, so that the Plaintiff had not the Liberty of excepting against them, and the Clerk is not responsible if they be deficient in this Court, tho' he was in London. Per Holt C. J.

*Capt. Kirk's Case.* Mich. 11 W. 3.

( 6. )  
5 Mod. 454,  
455.

**C**aptain Kirk being indicted for the Murder of Conway Seymour, Esq; the Question was, Whether he should be brought to his Trial this Term? The Chief Justice thought the Prisoner ought to be tried, for that the Prosecutor had been too dilatory in his Prosecution; and Men ought not to be restrain'd of their Liberty any longer, than a convenient Time for them to be brought to their Trial: But by the other Justices, the Trial ought to be put off, because the Prisoner, after his Surrender, did not give timely Notice to the Prosecutor.

2 Jon. 210,  
222.

Afterwards Mr. Kirk was brought up by Rule of Court, and it was mov'd that he might be admitted to Bail; for he was dangerously ill, by Reason of the Badness of the Air and Inconveniency of the Prison; and it was insisted, that upon Proofs of such Matters the Court had frequently bailed Persons, tho' the Coroner's Inquest had found them guilty of Murder: And the Reason is, for that Imprisonment in such Case, is not design'd as a Punishment, but only to bring the Parties to Justice. But it was said on the other Side, that altho' the Court had Power to Bail in Treason or Murder, it would not exert that Power unless it were in extraordinary Circumstances: Here is no Pretence of a malicious Prosecution; and 'tis not doubted, whether Mr. Seymour was kill'd by this Gentleman; that too plainly appears, so that 'tis but reasonable he should give Account of Spilling his Blood.

Holt C. J. I do not think that the Prisoner's Affidavits are full enough; for it doth not appear, that by this Imprisonment he is in Danger of his Life. It was adjudg'd in Egerton's Case, 13 Jac. 1. That if there were any Delay in the Prisoners putting off their Trial, or in not giving timely Notice, there could be no Bailing of them: And here, since the Prisoner did not give Notice of his Render to the Prosecutor, as this is good Cause for deferring the Trial, so it is likewise the same for his not being baid'd.

Anonymus. Mich. 11 W. 3.

**T**HE Plaintiff in the Action sues the Bail-Bond, he cannot refuse the same Persons to be Bail that were put in by the Defendant to the original Action; but if the Plaintiff proceed against the Sheriff by Amercement, he is not compellable to accept of those Persons, who are Sureties to the Sheriff, to be Bail to his Action: So if a Cause be removed by Habeas Corpus out of the Marshalsea, or any other inferior Court, and the Bail there offer to be Bail to the Action here, the Plaintiff is obliged to take them; because he might have excepted to them below, but did not. Per Holt C. J.

(7.)  
1 Salk. 97.  
Farell. 62.

In all Cases where a Cause comes in by Habeas Corpus, the Defendant shall find Special Bail, save in the Case of an Executor. 6 Mod. 242.

Hill. 11 W. 3.

**I**N an Action of Debt upon a Bond, if the Defendant says it was by Duress, or usurious, that will not excuse him from Special Bail; for the Court will not determine the Merits of a Cause upon a Motion for Bail, but will let it come down fairly to Trial without Prejudice.

(8.)  
1 Salk. 100.

Anonymus. Hill. 11 W. 3.

**A**N Action for Money won at Play; Gould and Turton were for denying Special Bail; for, since the Plaintiff played upon Tick, they would not help his Security; and they were for making it a Rule of Court.

(9.)  
1 Salk. 100.

Holt C. J. contra: The Practice has been otherwise, the Contract, if under 100l. is lawful; and we cannot so far Discountenance what the Law allows, and to say they were not to better his Security since he play'd upon Tick, would prove that there should be no Bail in an Indebitatus Assumpsit, &c. The Rule for Special Bail stood.

Rex



Rex *versus* Davison. Trin. 12 W. 3.(10.)  
1 Salk. 105.1 Bull. 122.  
Far. 59.1 Salk. 294.  
134.1 Cro. 507,  
552, 558.

Far. 61.

Latch 174.

Cro. Jac. 29,  
67.

1 Roll. Rep.

132, 384.

1 Sid. 286.

2 Roll. Abr.

213.

**A** Habeas Corpus issued to bring up the Body of one D. a Quaker; the Cause returned, was a Writ of Excommunicato capiendo, which recited a Significavit of an Excommunication for teaching School without a Licence: The Court desired to hear Counsel, whether this were an Offence? Mr. Northey moved he might be bailed while the Legality of the Return is under the Consideration of the Court, and cited Authorities, Vaugh. 157. Lat. 174. 1 Cro. 552, 557. and also Price's Case, Mich. 29 Car. 2. B. R. who was taken upon an Excommunicato capiendo, and brought up by Habeas Corpus, and bailed while the Return was under Consideration; and in that Case the Court being against Price upon the Return, his Counsel insisted that he could not be committed again, but he was recommended; and Clerk's Case, who was committed by the Vintners Company, and bailed by Holt C. J. at his Chamber; upon these Authorities the Defendant was bailed; and the Entry was, Traditur in ballium, & interim Curia advisare vult. And the Condition of the Recognizance was, To appear the first Day of the Term, and from Day to Day; and if the Court should adjudge the Return good, to render his Body to Prison.

Holt C. J. said, They bailed Men in Execution upon an Audita querela, and by the Petition of Right, must bail or remand Men in convenient Time. The same Rule this Term, while the Court considered the Return in Reynold's Case, who was committed by the Court of Aldermen, for assisting to marry a City Orphan.

Lumley *versus* Quarry. Pasch. 1 Ann.(11.)  
1 Salk 101.Far. 9.  
1 Salk. 98.  
1 Sid. 418.

**I**n an Action brought for a Ship and Cargo, the Question was, Whether the Defendant should be discharged upon common Bail. It was alledged for the Plaintiff, that the Cause came in from London by Habeas Corpus, and therefore they ought to have Special Bail of Course.

But Holt C. J. held, That the Court here could examine into the Cause of Action upon a Habeas Corpus, and took this Diversity, that if the Cause of Action required Bail, tho' it were under the Value of 10 l. they would hold the

the Defendant to Bail: But if the Action was veracious, or required no Bail, as an Action against an Executor, they would discharge him upon common Bail. Then it was urged for the Defendant, that what he did with Relation to this Ship and Cargo, was as Judge of the Admiralty in the West Indies: Therefore he ought not to be held to Bail. On the other Side, It appeared that the Defendant had the Ship and Cargo in his own Custody, which was going beyond the Duty of his Office; and for this Reason he was held to Bail.

Grovenor *versus* Soame. Hill. 2 Ann.

A Joint Bill of Middlesex was issued against three Defendants, with an *Ac etiam super scriptum obligat.* by them jointly and severally: The Sheriff took one Bail-Bond for the Appearance of the Three; and there being no Appearance, the Plaintiff took an Assignment of the Bond, and now moved to have the Sheriff amerced.

By Holt C. J. The Bail-Bond is not according to the Statute, being for a joint Appearance to several Actions. He said, it had been adjudg'd in C. J. Glyn's Time, that if the Sheriff takes insufficient Bail, and has not the Party at the Return of the Writ, an Action would lie against him; but since it has been held otherwise: It was indeed always agreed, that an Action would not lie for taking insufficient Bail; but it was not settled, whether it would lie, or not, for taking insufficient Bail, and not having the Defendant at the Return of the Writ; for tho' the Statute commands him to take reasonable Bail, yet if he has not the Party, he shall be amerced, and the Statute does not exempt him from Amercement.

(12.)  
Mod. Cases  
122.

1 Vent. 55.  
1 Saund. 80.  
2 Saund. 154.  
1 Mod. 33.  
240.

Garibaldo *versus* Cognoni. Mich. 3 Ann.

IN Trespas, a Writ was taken out by the Plaintiff, returnable in Michaelmas-Term past, and in Hillary-Term Bail was put in, and after a Trial 100 l. Damages were given to the Plaintiff: And now on a Scire facias against the Bail, they applied to the Court for Relief as to the Damages; for that the *Ac etiam*, which was put in the Writ by Leave in Michaelmas-Term, was only 40 l. and the Bail meant to undertake for no more; and as the

(13.)  
Mod. Cases  
266, 267, 268.  
1 Salk. 102.

- 1 Sid. 276.  
2 Kcb. 101.  
3 Mod. 8.

Plaintiff had declared for and recovered more Damages, the Bail were thereby altogether discharg'd: And a Rule of Court said to have been made in the 22d Year of King Charles the Second, That in Case of Bail, if the Recovery were for more than was mentioned in the Writ, the Bail should not be charged at all in that Action, was much insisted on.

- 1 Sid. 183,  
258.  
1 Vent. 44.  
Sec. Ord.  
Pas. 5 Geo. 2.  
Stat. 12 G. 1.  
c. 29.

Holt C. J. There was Reason for such a Rule, to pursue the Act 13 Car. 2. c. 2. That Bail should know what they became bound for; and that must be by recovering no more than was express'd in the Writ, to which the Bail of Necessity relates; whereas if the Plaintiff recovers more, the Bail, if at all liable, must be so but for what is recover'd, their Condition being to answer the Condemnation, or render the Principal: And it would be extream hard to ensnare the Bail to a greater Sum than is mentioned in the Writ. As the Process against them must be founded upon the Judgment, it seems from thence they should answer for all, or none; but if less than is mentioned in the Writ be recover'd, there is no Inconvenience to the Bail; and if there be no Bail given but common Bail, it is but just that the Wrong-doer should answer whatever is recovered. Powel and the rest agreed with the Chief Justice, That the Bail by no Means ought to answer for more than was mentioned in the Ac etiam.

The Chief Justice said further, The above-mentioned Rule was made to rectify an extraordinary Practice in this Court; which was, If a Man became bound for another in an Action of 10 l. he was thereby bound in all Actions of the same Term, by the same Plaintiff against that Defendant, let the Sum be ever so great, which was mighty inconvenient.

### Cholmley *versus* Veal. Mich. 3 Ann.

- (14.)  
6 Mod. 304.

SCIRE facias against the Bail, who plead no Capias against the Principal. In Replication a Capias is set forth, and Non est inventus returned upon it, which appeared to be tested a Year after the Judgment.

Holt C. J. The Plaintiff intitles himself to recover against the Bail upon Breach of the Recognizance, which is, that he should answer the Condemnation, or render the Principal at the proper Time; and the Breach is assigned, and a Capias set forth to have been taken out and returned;



and what need he take Notice of a Scire facias, for the Bail are Strangers to the Record, and cannot take Advantage of Error in it. So the not being of a Scire facias previous to the Capias taken out after the Year, is but Error at the best, of which Bail cannot take Advantage. Judic' pro Quer' per tot' Cur'.

### Butler *versus* Rolls.

ON a Bail-Bond the Defendant was sued, to which Action he pleaded, and had Notice of Trial; and then he moved to stay Proceedings on the Bond, upon his bringing into Court the Principal, Interest and Costs, which was granted, so as he bring it in such Time that the Plaintiff might not be delay'd of the Trial, otherwise to proceed. (15.)  
3 Salk. 53, 56.

And by Holt C. J. The ancient Course was, that a Bail-Bond could not be put in Suit 'till a Rule was made to amerce the Sheriff, for not having the Body; and the Practice now is, to stay Proceedings on the Bail-Bond, if there is no Return of a Cepi Corpus.

### Anonymus. Pasch. 4 Ann.

IN Debt upon a Judgment, pending a Writ of Error, the Court will discharge the Defendant upon common Bail: But a Prisoner in Execution shall not be bailed or enlarged, except upon an Audita Querela. (16.)  
3 Salk. 55, 58.

If the Defendant dies after a Capias sued out, and before the Return of it, the Bail is discharge'd. Mod. Cases  
305.

## BANKRUPTS.

Luton and Bigg. Trin. 2 W. &amp; M.

(1.)  
Skin. 276.

**A** Special Verdict found, That Bigg was a Freeman of London, and kept an Inn there, and that he bought all the Things that he sold in his Inn, and them there sold and uttered, by which he gained his Living, and that he had built a Ship, and had a Share in her, and a Stock there to the Value of 50 l. that he absented from his House, and that upon Petition to the Commissioners of the Great Seal, a Commission of Bankruptcy, &c.

Holt C. J. and Eyre inclined, That an Inn-keeper is not within the Statutes, and in a subsequent Term the Court gave Judgment *una voce*, that an Inn-keeper is not within the Statutes of Bankrupts; and also that the Plaintiff having a Share in a Ship, and a Stock there for Trade, it does not make him a Trader within those Statutes; and first, That an Inn-keeper is called in the Law, *Communis Hospitator*, scil. he is a Person who receives Travellers, and provides Necessaries for them and their Horses and Attendants, and employs Servants for this Purpose; so that he is distinguished by this from other Traders.

Secondly, An Inn-keeper does not sell by Contract, but delivers his Goods to his Guests as they require; and if he takes an excessive Price, he may be indicted, which other Traders cannot, and he is under the Correction of the Justices; and if he misgoverns his Inn, he may be suppressed, for he is in the Nature of a publick Person, and his Gain does not rise from the Victuals that he sells, but from his Furniture and Attendance, as well as from his Meat and Drink, &c. and this is a Trading to a particular Purpose, and in a particular Manner, and then he will not be within the Statutes, as was adjudged in Sir Thomas Littleton's Case, per Hale C. J. &c. buying Victuals for the Navy, tho' by it he had gained great Credit, and incurred Debts to a great Value; and tho' he usually sold Victuals to others besides the King, when the Navy was sufficiently served; yet because that his Contract was for a particu-

lar Purpose and Design, he was not within the Statute of Bankrupts. And as to the Objection, that a Shoemaker is within these Statutes, yet great Part of his Gain is by his Labour; it was answered by Holt C. J. That his Labour is in Melioration of his Commodity; and this remains the Thing it was when it was bought, but only made useful and fit for the Buyer; so that he buys Leather, and sells Leather, and has Profit by it, but the Gain of an Inn-keeper is quite of another Nature. And as to the Difference of an Inn-keeper in London, and in the Country, Holt C. J. did not see any Difference; for tho' an Inn-keeper in the Country does not buy his Hay and Oats, yet he buys Meat and Bread.

As to the second Point he said, the having a Part in a Ship would not make him a Trader, and cited Worstenholm's Case, and the Stock is not material, he not having employed it in Trade; and he said also, that the Employing a Sum of Money in the Way of a Venture in Trade would not make a Man a Trader; and so by all the Court *seriatim* adjudg'd for the Plaintiff.

And 1 Show. 96, 268. the same Case, by the Name of Newton versus Trigg, and the Argument seems better taken than in that of Skinner. Comb. 181.  
3 Lev. 309.  
3 Mod. 327.

C. J. Holt. An Inn-keeper cannot be a Bankrupt, he is not taken Notice of in our Law as a Trader for Buying and Selling, but as Hospitator, Caley's Case, 8 Rep. which describes his Life, and Manner of Living; he is bound to provide for Travellers, and to protect and secure their Goods; he is not paid upon the Account of the intrinsic Value of his Provisions, but for other Reasons; the Recompence he receives, is for Care and Pains, and for Protection and Security, he doth not buy and sell, but only for this particular Purpose: By the Trade of Buying and Selling in the Statute, it must be intended somewhat of the same Nature with that mentioned before, viz. Exchange and Barter, 1 Cro. 31, 46. Hutt. 44. Shoemakers and Cannerys, they do not sell the Commodities, but are paid for their Manufacture; they only make the Commodity useful, and the Buying is with Intent to make them fit for Sale; but the End of an Inn-keeper in his Buying, is not to sell, but only a Part of the Accommodation he is bound to prepare for his Guests. A Farmer is not within the Statute, and yet there is not a Farmer in England but buys and sells, and that necessarily for the managing his



Occupation as a Farmer. Where-ever a Man sells under a particular Restraint and Limitation, he is not a Seller within the Statutes. Sir Thomas Littleton's Case, and the Case of Gun-Founders in the Exchequer, was held not to be within it, because a particular Undertaking. Suppose an Inn-keeper had a Farm, and has his Provisions out of his Farm. A Schoolmaster that takes Boarders, buys great Provisions, and gets great Credit, and yet he was never thought within the Statutes: And I think there is as much, or more Reason, to bring him within them, for he makes a Contract ad Libitum, which an Inn-keeper cannot; and so he concluded pro quer', declaring Dolben to be of the same Opinion; Eyre and Gregory having first spoke to it, and to the same Purpose. So the Judgment is by the whole Court upon Deliberation.

Anonymus. Pasch. 7 W. 3.

( 2. )  
3 Salk. 61.  
59.

**I**F there are two Joint-Traders, and one of them becomes a Bankrupt:

Per Holt C. J. The Commissioners cannot meddle with the Interest of the other, for 'tis not affected by the Bankruptcy of his Companion.

Bracy's Case. Mich. 8 W. 3.

( 3. )  
Com. 390,  
391.

**H**E was committed by Commissioners of Bankruptcy, and the Conclusion of the Commitment was, until he conform himself to our Authority, and be thence delivered by due Course of Law.

Cowper, Shower and Northey for the Prisoner, that the Conclusion of the Commitment ought to have been, until he shall submit himself to be examined upon Interrogatories, according to the Intent and Meaning of the Act, for being a Special Authority to commit, the Words must be pursued: Here the Commissioners required Bracy to tell all that he knew touching the Estate of the Bankrupt, and (that being too general) they asked, when, and in what Manner, did you aid or assist in imbezilling the Estate of the Bankrupt? (not whether he did aid or assist) and for not answering, then committed him.

Holt C. J. The Prisoner must be discharged, for the Conclusion of the Commitment is ill. So where Justices

com-

committed Overseers until they should be delivered by due Court of Law (where the Statute says until they account) we discharged them here. The Conclusion should have been, till he shall submit and be (or to be) examined touching the Premises; or (as Mr. Cooper said) upon Interrogatories.

*Husley versus Fidell.* Hill. 11 W. 3.

Adjudged by Holt C. J. **T**HAT a Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not merely void; but it may be avoided or not avoided by the Commissioners and Assignees at Pleasure; and between the Parties the Contract is good. The Commissioners may bring Action of Trover for the Goods, as supposing the Sale to be void; or bring Debt or Assumpsit for the Value; but this affirms the Contract. (4.)

*Hopkins versus Ellis.* Trin. 3 Ann.

**A**N Issue was directed out of Chancery, to try whether the Defendant was a Bankrupt or not, at such a Time. (5.)  
1 Salk. 110.

Holt C. J. If a Man commits a plain Act of Bankruptcy, as keeping House, &c. notwithstanding he afterwards goes abroad and is a great Dealer, he will still remain a Bankrupt, and that will not purge the first Act of Bankruptcy. But if the Act be not plain, but doubtful, then going abroad and dealing, &c. will explain the Intent of the first Act; for if it was not done to defraud Creditors and keep out of the Way, it will not be an Act of Bankruptcy within the Statute. And if after any plain Act of Bankruptcy, he pays off or compounds with all his Creditors, he thereby becomes a new Man.  
1 Lev. 13,  
14, 17.  
2 Show. 253,  
512.

## BARGAIN and SALE.

Thorpe *versus* Thorpe. Pasch. 13 W. 3.

(1.)  
1 Salk. 171,  
122, 113.

15 H. 7. 10.  
1 Vent. 177,  
214, 147.  
48 E. 3. 2.  
7 Rep. 100.  
1 Saund. 319.  
1 Jones 218.  
Dyer 76.  
cont.

**I**N this Case, Holt C. J. said, Every Man's Bargain ought to be performed as he intended it; for when he relies upon his Remedy, it is but just that he should be left to it according to his Agreement: But on the contrary, there is no Reason a Man should be forced to trust where he never meant it: And therefore if two Men should agree, one that the other should have his Horse, the other that he will pay 10 l. for him; if the Party will have the Horse he must pay the Money, but no Action will lie for the Money till the Horse is delivered. In Executory Agreements, that one should do an Act, and for the doing thereof the other shall pay, &c. the doing of the Act is a Condition precedent to the Payment, and the Party who is to pay the Money shall not be obliged to do it till the Thing be performed for which he is to pay.

But if a Day be appointed for Payment of the Money, and it is to happen before the Thing can be performed, an Action may be brought for the Money before the Thing is done; for it appears, the Party depended upon his Remedy, and did not intend to make the Performance a precedent Condition: And where a certain Day of Payment is appointed, and that Day is to happen subsequent to the Performance of the Thing to be done by the Contract; in such Case, Performance is a Condition precedent, and must be averred in an Action for the Money.

Judgment for the Plaintiff.

Langford *versus* Tyler. Pasch. 3 Ann.

(2.)  
Mod. Caf.  
162.

**T**HE Defendant sold several Cubs of Tea to the Plaintiff at so much per Pound, who took one Cub away, paying for it, and 50 s. over to go towards Payment of the rest. When he came for the rest of the Tea, the Defendant would not stand to his Bargain, and thereupon an Action was brought, and two Counts, one upon the



the Agreement, and the other Indebit' for 50 s. received to the Plaintiff's Use.

By Holt C. J. If a Bargain be made, and Earnest given, without an express Agreement that Payment is to be made at a certain Time, the Money must be paid upon fetching away the Goods, and before they are removed, because no other Time for Payment is appointed. The Earnest only binds the Bargain, and gives the Party a Right to demand the Goods, and a Demand, without Payment or Tender of the Money, is void, for it is not pursuant to the Intent of the Bargain. After Earnest given, the Vendor cannot sell the Goods to another, without a Default in the Vendee; and if the Vendee doth not come and pay the Money agreed, and take the Goods, the Vendor ought to go and request him to do it; and then if he does not come and pay, and take away the Goods in convenient Time, the Agreement is dissolved, and the Vendor may sell them to any other Person.

1 Keb. 337.  
Aley 61.  
1 Sid. 109,  
425.  
1 Vent. 42.  
2 Vent. 155.

## B A R O N and F E M E.

Obryan *and* Ram. Pasch. 1 W. & M.

**E**RROU out of Ireland, where there was a Judgment against a Feme sole, who married; a Scire facias issued against the Husband and Wife, and Judgment against them on two Nichils, a Year and Day expires before any Execution executed, the Wife dies, a Scire facias is awarded against the Husband alone, and Judgment thereupon against him, and Execution awarded: The Question is, if the Husband be chargeable.

Judgment was affirmed.

( 1. )  
Com. 103.  
S. C. 3 Mod.  
186.  
Carth. 30.  
The whole  
Record of  
this Case is  
in 3 Mod.  
170, &c.  
where there  
are also  
Arguments  
pro and con.

Pierce *versus* Welden. Mich. 4 W. & M.

**I**N an Action upon the Case, for Beat, Drink, Washing and Lodging found for the Wife of the Defendant; the Proof was, that the Wife came in a necessitous Condition to the Plaintiff, and said that she was Wife of the Defendant,

( 2. )  
Skin. 323,  
324.

pendant, and that he had turned her out of his House, and allowed her 50 l. per ann. but would not pay it.

Holt C. J. The Husband is not chargeable; for here it being apparent that she did not cohabit with the Husband, she shall not have a Credit to charge him without his Consent. And he said, If a Wife cohabit with her Husband, and by it gain Credit, tho' she depart without the Leave of her Husband, and come to London, and there become in Debt, the Husband shall be charged till Notice is given of her Elopement, for it shall be intended to be with the Consent of the Husband; but after Notice, the Husband shall not be charged without his Consent.

The Plaintiff was Nonsuit.

*Curry and Wife Administratrix, &c. versus Stevens.*  
Hill. 6 W. 3.

(3.)  
Com. 311.

**I**Ndebitatus assumpsit for Honey received by the Defendant to the Use of the Plaintiffs, the Defendant pleads Quod causa actionis non accrevit infra sex annos. The Plaintiffs reply, That the Party died Intestate tali die, and that no Administration was committed till such a Time, and then Administration was committed to the Wife, et sic causa actionis accrevit, &c. and conclude to the Country, and (as it should seem) the Defendant demurred.

Holt C. J. It hath obtained, that an Indebitatus lieth in such Case, but it seemeth not proper to the Use of both, (tho' it may conclude ad dampnum ipsorum) for the Difference is, where the Wife hath the Chose in Action in her own Right, and where en autre droit; in the one Case it shall survive, in the other not; in the one Case a Judgment alters the Property, in the other not; but where there is Judgment against a Feme sole, and afterwards a Scire facias, and Judgment thereupon against Husband and Wife, and she dies, the Husband is bound. Quod nota.

Here the Plaintiff in his Replication ought to have concluded to the Country, for the Defendant might rejoin, that the Party made a Will, or died Intestate, and that Administration was committed to J. S. For if one dies Intestate, and first Administration is committed to one, and a Stranger receives Honey, and then Administration is granted to another, the six Years shall be accounted from the first Administration; as where a Man of full Age hath Right of Entry, and dies, leaving an Infant, the Time

shall run on. (Q.) Here the special Matter is not waived by the Conclusion, it being in the Affirmative. Plowd. 14, 15. He might either have omitted the special Matter, and concluded to the Country; or he might plead the special Matter, but then ought to conclude, Et hoc paratus est verificare; and he cited a Case, Hill. 22 & 23 Car. 2. in Debt upon an Obligation for Performance of Covenants, where of one was, that the Defendant (being Clerk to the Plaintiff) should give him an Account, &c. the Defendant pleads Performance of the Covenants; the Plaintiff replied, that the Defendant had received 5 l. and not given him an Account thereof. Now the Defendant might either rejoin, that he had given him an Account, and conclude to the Country, or that Defendants took it away without his Assent; & hoc paratus, &c.

In the principal Case Judgment for the Defendant.

Chamberlain *versus* Hewson. Hill. 7 W. 3.

MRS. Hewson, the Wife of Colonel Hewson, obtained a Sentence with Costs in the Spiritual Court against Mrs. Chamberlain; for Adultery with her Husband. Colonel Hewson released the Costs to Mrs. Chamberlain; notwithstanding which Mrs. Hewson prosecuted her there for the Costs. Upon which it was moved here for a Prohibition; and it was urged contra, That the principal Matter was of Ecclesiastical Consuance; and that they ought not to be hindered to determine a Matter which is incident and necessary. (4.)

Et per Holt C. J. By the Husband's Release she is barred in this Case. So it is if Husband and Wife be divorced a mensa & thoro, and a Legacy is left to the Wife, and the Husband release it; for the Marriage continues, and the Husband hath all her Right. But if the Husband and Wife be divorced a mensa & thoro, and the Wife has Alimony, and sues for Defamation or other Injury, and there has Costs, the Husband's Release shall not bar the Wife; for these Costs come in lieu of what she hath spent out of her Alimony, which is not in the Husband's Power.

1 Salk. 115,  
116.  
5 Mod. 69.  
2 Rol. Abr.  
402. pl. 3.  
Moor 683.  
pl. 492.  
Moor 665.  
1 Rol. Rep.  
426.  
3 Bulst. 264.  
Noy 45.  
Cro. El. 908.  
2 Roll. Abr.  
293.  
pl. 300. pl.  
10.  
Cro. Car.  
222.  
5 Mod. 71.



Carpenter *versus* Fauſtin. Hill. 7 W. 3.

( 5. )  
1 Salk. 114,  
115.

**A**N Action against Baron and Feme, for a Battery done by the Wife. The Husband was a Prisoner in the King's Bench before the Action brought, and the Plaintiff delivered a Declaration to the Turnkey against Husband and Wife; and upon Rules given to plead, Judgment was entered by Nil dicit against both, and the Wife taken in Execution. Sir Barth. Shower moved, that this was irregular; for upon Delivery of the Declaration, the Husband should have filed common Bail for him and his Wife, or should have made an Attorney for him and his Wife, who should have appeared for them.

2 Keb. 355.  
1 Mod. 8.  
Far. 10.  
1 Sid. 20.  
395.  
1 Mod. 135.  
1 Lev. 1, 51.  
1 Keb. 189,  
198, 637.  
1 Sid. 29.  
6 Mod. 17.  
2 Keb. 442.

Et per Holt C. J. The Plaintiff ought to have sued out Process against Husband and Wife, and the Sheriff should have returned a Non est inventus for the Husband, and a Cepi Corpus for the Wife; and then upon common Bail filed for her, there might be Judgment against both. It was objected, if there be Process against Baron and Feme, and Non est inventus for the Baron, and a Cepi as to the Feme, she shall be discharged. Vide 2 Cro. 445.

Holt C. J. She shall not be discharged, but upon common Bail; and then new Process shall go against the Baron, with an Idem dies given to the Wife. Vide 1 Mod. 8. accord. And because no Bail was entered for the Wife, the Judgment was set aside. Postea Hill. 8 W. B. R. In another Case, Holt C. J. held, If an Action be brought against Husband and Wife, and the Husband is arrested, he shall put in Bail for both; but if in an Action brought against the Husband only, you cannot declare against Husband and Wife.

Todd *versus* Stokes. Mich. 8 W. 3.

( 6. )  
1 Salk 116,  
118.

**T**HE Plaintiff being an Apothecary, served the Defendant's Wife with Physick, who lived separate from her Husband, and had a separate Allowance of 20l. a Year.

1 Mod. 9.  
1 Lev. 5.  
1 Vent. 42.

Per Holt C. J. If a Baron and Feme part by Consent, and she has a separate Allowance, 'tis very unreasonable she should still have it in her Power to charge him: And in such Case it is not to be presumed, but Tradesmen that deal

with

with her trust her on her own Credit, and not on the Credit of the Husband; and a personal Notice is not necessary, for tis sufficient if it be publick and commonly known.

Woodyeer *and* Gresham. Mich. 9 W. 3.

**I**N a Writ of Error upon a Judgment in C. B. in a Scire facias; The Case was, a Feme sole recovered in C. B. and took a Husband, and after they joined in a Scire facias to have Execution, and had Judgment in the Scire Facias; the Wife died, and the Husband sued Execution without taking out Letters of Administration; and it was objected, that he ought not to have Execution in his own Right, but as an Administrator to the Wife.

( 7. )  
Skin. 68.  
S. C. 1 Saik.  
116.  
Carth. 415.

Holt C. J. said, There was no Difference in Reason, between this Case and the Case of Obrian and Ram, Mich. 3 Jac. 2. Rot. 192. which was a Scire facias against Baron and Feme upon a Judgment against the Feme, in Debt due dum sola, and after Judgment against Baron and Feme, the Feme died, and the Husband was charged in a Scire facias brought against him.

And Holt C. J. said, The Judgment in a Scire facias attached a joint Interest in Baron and Feme, and if the Husband died it would survive to the Wife, and eontra; and though the Judgment in a Scire facias does not alter the Nature, yet it changes the Property of the Debt, and Debt may be brought upon an Award of Execution.

Judgment affirmed.

Hyde *versus* S——. Mich. 10 W. 3.

**T**RESPASS against Husband and Wife; Husband died, and it was moved in Arrest of Judgment; sed non allocatur; for Wife may commit Trespas along with Husband, and also Felony, if it be not by Coercion of Husband; and tho' in Declaration in Trover against Husband and Wife, laying Conversion ad usum ipsorum, Judgment was arrested; yet if it came in Question again, it should not be so by my Consent. Holt.

( 8. )  
Cases W. 3.  
246.

Shardelow *versus* Naylor. Hill. 1 Ann.

(9.)  
1 Salk. 313.

A Woman by Deed settled her Estate in Trust, reserving a Power to give by her last Will Legacies as she should think fit; and this was done before Marriage, with the Consent and Privy of the intended Husband, but he refused to be a Witness, or a Party to the Deed. The Marriage took Effect, the Wife made a Will, and died, and the Executor proved the Will.

Far. 147.  
Goldsb. 109.  
1 And. 181.  
1 Jon. 388.  
4 Co. 61.  
8 Co. 82. a.  
1 Vent. 186.  
Bridgm. 83.

Et per Holt C. J. This is not a Will, neither ought the Ordinary to prove it, if he does, a Prohibition lies. Where a Woman Executrix marries, she may make a Will with her Husband's Consent, but not without it, 1 Jon. 157. So if a Woman, having Debts due to her, marries, she may make a Will quoad these, and the Ordinary may prove it.

In the principal Case, it appearing that the Ordinary had only granted Administration quoad the Goods in this Will, 'twas allow'd as reasonable. Cro. Car. 219.

Warr *versus* Huntley. Pasch. 2 Ann. Before  
Holt C. J. at Nisi Prius in Middlesex.

(10.)  
1 Salk. 118.

A Ordinary working Man married a Woman of the like Condition, after Cohabitation for some Time, he left her, and during his Absence she worked; and this Action being brought for her Diet, 'twas held, that the Money she earned should go to keep her.

Etherington *versus* Parrot. Pasch. 2 Ann.

(11.)  
1 Salk. 118.

IN Case for Goods sold and delivered by the Plaintiff to the Defendant's Wife; The Evidence to charge the Defendant was, that his Wife bought the Goods to make her Clothes, and that they cohabited. On the other Side it was proved, that she was very extravagant, and used to pawn her Clothes for Money, and tho' redeemed by the Husband, she had pawn'd them again, and that she wanted no Clothes when she bought these Goods; and further, that the Defendant the last Time he paid the Plaintiff, warned his Servant not to trust her any more.



Holt C. J. Where a Husband turns away his Wife, he gives her Credit where-ever she goes, and must pay for Necessaries for her: But if she runs away from her Husband, he shall not be bound by any Contract she makes. And while they cohabit together, the Husband shall answer all Contracts of hers for Necessaries; for his Assent shall be presumed upon the Account of cohabiting, unless the contrary appear; in which Case, as by Warning, &c. there is no Room for such a Presumption: And there is no Necessity in this Case, and Notice to the Servant was sufficient.

1 Sid. 115,  
425.  
Allen 61.  
1 Lev. 4.  
2 Lev. 116.  
1 Mod. 124.

If a Woman takes up Goods, and pawns them before they are made into Clothes, her Husband shall not be compelled to pay for them, because they never came to his Use; 'tis otherwise if they were made up and worn, and then pawned for Money.

Robinson *versus* Gosnold. Pasch. 3 Ann.

THE Defendant discovered his Wife to be a very lewd Woman, on which he goes away from her, and she, after having lived several Years with an Adulterer, was received into the Plaintiff's House, who entertained her as the Defendant's Wife: And then this Action, being an Indebitatus Assumpsit against the Husband for Lodging and Dieting the Wife, was brought.

(12.)  
Mod. Cal.  
171.

Holt C. J. held in this Case, that let the Woman be ever so vicious, while she will cohabit with her Husband he is bound to provide her Necessaries, and is liable to the Actions of such Persons as furnish her with them; for his Bargain on the Marriage was to take his Wife for better or worse. In like Manner it is, if he turns her away for her Wickedness. But if the Wife leaves the Husband, they, that trust her after it is notorious that she has left him, do it at their Peril, and shall not thereupon charge the Husband, unless he takes her again.

1 Lev. 47.  
1 Vent. 42.  
2 Vent. 155.  
1 Sid. 109.  
1 Mod. 124.  
1 Keb. 69,  
82, 87, 206,  
&c.

And the Chief Justice was of Opinion, If a Wife had run away and contracted Debts, and after the Husband received her, or came after and lay with her but for a Night, that would make him liable to the Debts: As in Case the Wife elopes with an Adulterer, tho' she thereby forfeits her Dower, yet if the Husband will receive her again, she shall have her Dower.

James *versus* Warren. Pasch. 5 Ann.

(13.) Money or Goods given a Woman that is forlorn by her Husband shall be recovered from the Husband, *scilicet* where she elopes.

**T**HIS was an Action brought for 12l. which was given to the Defendant's Wife to maintain her, and to keep her from starving, after that the Defendant had left her.

Holt upon Evidence laid down these Rules for the Jury : Where a Woman goes away from her Husband, and a Tradesman gives her Credit for any Goods, &c. after that he knows she left her Baron, then he trusts her at his Peril ; but if a Man runs away from his Wife, or turns her away, and leaves her not wherewithal to maintain herself, then he gives his Wife Credit for Money or Necessaries ; but if the Baron turns away his Wife, or leaves her, and before she takes up any thing, the Husband does propose to maintain her at Home (tho' yet he will not lie in Bed with her as a Man should do with his Wife,) yet if any Money was, after such Offer or Proposal made and refused, disbursed for the Wife, that was to be at the Peril of any Person so disbursing the Money, unless the Jury be of Opinion that such Offer was deceitful and fraudulent. For a Wife is to be maintained by her Husband where and how he thinks fit, according to his Ability.

Lutting *versus* Browning. Hill. 6 Ann.

(14.)

**D**EBT upon a Bond brought by the Assignees of the Commissioners of Bankruptcy. The Case was, A. being bound in a Bond to B. B. made his Will, and his Wife Executrix, and died ; his Wife took upon her the Execution of this Will, and married a second Husband, who became a Bankrupt ; and the Commissioners assigned this Debt.

It was argued, This is a Debt due to the Wife in *auter droit*, and so not assignable, within any of the Statutes of Bankruptcy, 'tis not forfeitable by her or her Husband. 10 E. 4. 1. Fitz. 47. Kelw. 64. 1 Cro. 208, 214, 264. 1 Jones 204. 1 Lev. 17. Raym. 67. If a Feme Executrix take a Husband that commits Waste, it is her own Folly ; but it is hard to oblige her to commit a Devastavit.

There are no Words in any of the Statutes, that make the Estate of another the Bankrupt's Estate.

Serjeant Parker eontra, The Queſtion is, whether the Commissioners can't assign over a Debt due to the Wife of a Bankrupt as Executrix. The Husband may grant the Goods which the Wife hath as Executrix; and therefore the Queſtion is, whether the Statute doth not enable the Commissioners to make ſuch Grants as the Party himſelf could do. They have Power by the Statute to assign all Debts due to the Bankrupt, by what Perſon, or by what Banner, &c. now it muſt be agreed, that what Surpluſage is here, is for the Benefit of the Bankrupt. If the Husband of an Adminiſtratrix grants omnia bona & catalla, all thoſe Goods ſhall paſs, tho' he hath them in Right of his Wife. 2 Cro. 313. Dyer 5. If a Man be bound to another for the Uſe of a third Perſon, who becomes a Bankrupt, that Bond may be assigned over. Noy 142. Palmer 505.

Holt C. J. They have Power to assign nothing but what is the Bankrupt's Eſtate; and if the Wife die beſore Aſſignment by him, there muſt be an Adminiſtration de bonis non.

The Power of the Husband to diſpoſe of his Wife's Eſtate doth not make a Title in him. Though the Husband may diſpoſe of a Term which he hath in Right of his Wife, yet if he become a Bankrupt, the Commissioners cannot assign over this Eſtate. Sir John Knight verſus Pitt; there was a Scire facias brought by an Executor upon a Judgment that he had as Executor; the Defendant pleads a general Release of all Debts and Demands; the Plaintiff ſets forth that there was a Debt due from the Defendant to the Plaintiff in his own Right; and it was adjudged, that the Release did not diſcharge the Debt due to him as Executor, and Judgment was given for the Plaintiff. If the Executor ſell the Goods, and doth not pay the Debts, then is it a Devaſtavit. The Property of the Surpluſage can never veſt until the Debts are paid.

Powell Juſtice: I was in that Caſe of Sir John Knight verſus Pitt, and the Judgment was as my Lord Chief Juſtice has ſaid. If a Man hath Goods which are his own, and Goods in auter droit, and grant omnia bona ſua, then thoſe that he hath in his own Right will paſs, and not thoſe which he hath in auter droit. Here you have nothing to do but with the Debts of the Bankrupt, and not thoſe of the Teſtator.



Billinghamst *versus* Spearman. Pasch. 7 Ann.

(15.) **I**N Debt for Rent against the Assignee of a Term, the Plaintiff declares, that T. was seised in Fee of several Messuages, and that he with others demised them to J. for 100 Years, at the yearly Rent of 20 l. and so conveys the Reversion to the Plaintiff; and that the 6th Day of January 1705, the Term came to C. who made his Will, and his Wife Executrix, and that upon the 26th Day of January 1706, she made her Will, and the Wife of the Defendant Executrix, and that her Husband entred, and for Rent arrears within such a Time he made his Demand, &c.

Sir Edward Northey: The Action is not well grounded, because the Wife is not joined, for the Right of Action accrued to the Husband from the Wife. 17 E. 4. 7. a. Cro. El. 356.

M<sup>r</sup>. Whitaker contra cited 26 E. 3. 64. tit. Debt 130. 10 H. 6. 11. F. N. B. 121. Kelway 125. Pl. 83 1 Lev. 25. Vane *versus* Minshall. 1 Keb. 20. 2 H. 4. 19. Bro. Debt 55. 17 E. 4. 7. 2 H. 4. 1.

Gould Justice: In the Case of Burton *versus* Gallop, Lord Hale was of Opinion, that if Lands were worth more than the Debt, an Action would lie in the Debt & detinet, but if less, in the Detinet only.

Holt C. J. There is a Difference between this Rent and a Rent-Charge; for if Lands are given to the Wife for Term of Life, out of which a Rent-Charge issues, and the Husband takes the Profits of the Lands, there an Action lieth against him only; for it is brought as he is the Terrentenant, and not in respect of the Estate: And if he let the Land out again, the Under-Lessee is chargeable in an Action for this Rent-Charge.

Powell Justice: If a Man lease Lands to a Woman for Life, reserving a Rent, who marrieth, and the Rent is arrears at the Death of the Wife, an Action will lie against the Husband. If a Feoffment be made to a married Woman, and her Husband consents to it, she may waive it after her Husband's Death; and yet an Assise will lie against them both, and Damages shall be recovered, and survive to charge the Wife.

## B A S T A R D.

Regina *versus* Weston. Trin. 4 Ann.

**W**ESTON was adjudged the Father of a Bastard by two Justices. It was excepted to the Order, 1. That it was to pay so much weekly to the Overseers of the Poor. Sed non allocat'. For, as before the Institution of Overseers, the Justices might order the Money to be paid to two or three of the Inhabitants, so now they may to the Overseers. 2dly, That it was said, we the said two Justices doth adjudge, &c. instead of do, and 1 Cro. 489. was cited to make this good. That was an Indictment on the 3 H. 7. c. 2. against Fulwood and others, quod ipsi cepit, for ceperunt; but the Roll of the Case being searched, Hill. 13 Car. 1. Rot. 24. inter placita coronæ, the Indictment was ceperunt; and not cepit, wherefore this Order was quashed. Note; this Cause came into Court Pasch. 4 Ann. by Habeas Corpus; and the Case was, that Weston had appealed to the Sessions, where the Order was confirmed, and he committed for not paying the Money ordered. And Mr. King took this Exception to the Return of the Habeas Corpus, (viz.) That the Sessions should have proceeded against him upon his Recognizance.

Et per Holt C. J. If they proceed on the 18 Eliz. the Sessions cannot commit, but proceed on his Recognizance. But if on the 3 Car. 1. they may commit, as the two Justices might have done; that is, unless the Party put in Security to perform the Order, or to appear at the next Sessions.

## BATTERY.

Cole *versus* Turner. Pasch 3 Ann.

6 Mod. 149.

6 Mod. 172.  
Carth. 480,  
491.

2 Rol. R.

545.

1 Mod. 3.

2 Keb. 545.

6 Mod. 127.

**A**T Nisi Prius, upon Evidence in Trespass for Assault and Battery, Holt C. J. declared, 1. That the least Touching of another in Anger is a Battery. 2. If two or more meet in a narrow Passage, and without any Violence or Design of Harm, the one touches the other gently, it is no Battery. 3. If any of them use Violence against the other, to force his Way in a rude inordinate manner, it is a Battery; or any Struggle about the Passage, to that Degree as may do Hurt, is a Battery. Vid. Bro. Tresp. 236. 7 E. 4. 26. 22 Alf. 60. 3 H. 4. 9.

Note; It was in Action of Battery by Husband and Wife, for a Battery upon the Husband and Wife, ad dampnum ipsorum; and though the Plaintiff had a Verdict, yet the Chief Justice said, he should never have Judgment. And Judgment was after arrested above upon that Exception.

## BILLS of EXCHANGE.

Cramlington *versus* Evans and Percival. Mich.  
1 W. & M.(1.)  
2 Vent. 307.  
1 Show.

**I**N a Writ of Error upon a Judgment in the King's Bench, where Evans and Percival declared against the Defendant in an Action upon the Case, that in the Realm of England, viz. in the Parish of Saint Mary le Bow London, there is and hath been Time out of Mind a Custom amongst Merchants and other Persons, (viz.) That if a Merchant, or other Person, makes a Bill of Exchange, according to the Usage of the Merchants, directed to a Merchant or other Person resident in England, requesting the



the Person to whom directed to pay the Sum of Money in the Bill mentioned, at the Time therein limited, to the Person in the Bill named, or his Order, for the Use of any other Person in such Bill mentioned, for the Value received of the Person mentioned in such Bill, and to place it to Account, as by Advice; and if the Person, to whom such Bill is directed, accepts it according to the Usage of Merchants, and if that Person who in such Bill is appointed to receive such Money, by an Indorsement upon the said Bill, orders the Payment of such Money to any other Person or Persons, or their Order, for the Value in the Indorsement mentioned, to have been received of the Person named in such Indorsement, if he that accepted such Bill doth afterwards refuse to pay it to him named in the said Indorsement, then he, which made and directed the Bill, upon Notice of such Refusal, is chargeable to pay the Money to the Person, or his Order, to whom by the Indorsement it was appointed to be paid.

Then they say that Cramlington, the 10th Day of Novemb. Anno Dom. 1685, at Newcastle, directed a Bill of Exchange of the same Date to one William Ryder, requesting him at 25 Days after the Date of the said Bill, to pay to Thomas Price or his Order 500 l. for the Use of Felix Calvert Esq; for the Value received of Francis Clever, and to place it to Account prout per advisamentum; and on the 14th of the said November it was shewn to the said Ryder, who then (according to the Usage of Merchants) accepted it, and that the said Price upon the said 14th Day of November, for the Value received of them the said Evans and Percival, by an Indorsement upon the said Bill, according to the Usage of Merchants, ordered the Contents thereof to be paid to the said Evans and Percival; and that the said Ryder afterwards, (viz.) the 5th Day of December in the Year aforesaid, was requested by them the said Evans and Percival to pay to them the said Money, according to the aforesaid Indorsement, and the said Ryder refused to pay it. Of all which the said Cramlington had Notice, viz. upon the 1st Day of January in the same Year; and by Reason thereof, and of the Custom aforesaid, he became charged with the Payment of the said Money to them the said Evans and Percival; and thereupon the said Cramlington, in consideratione pramissorum, did promise to pay the said 500 l. to the said Evans and Percival, &c. but not minding his Promise, had not paid the said Money, licet sepius requisitus, &c.

The Defendant Cramlington puts in a Plea in Bar, to this Effect, viz. Protestando, that there was no such Custom as set forth in the Declaration, pro placito dicit, that long before the Action brought, Felix Calvert in the Declaration mentioned was one of the Commissioners of Excise, and upon the 10th of November Anno primo Domini Regis nunc, by the Hands of Cleaver in the Declaration mentioned, did pay 500 l. of the Money arising to his Majesty upon the Duty of Excise, and at the Request of the said Calvert, the Defendant upon the same 10th of November, made and directed the aforesaid Bill of Exchange to the said William Ryder, to pay to the said Price 500 l. for the Use of the said Calvert, as in the Declaration is set forth.

And he further saith, That the said Calvert, upon the 24th Day of November, was indebted to the King upon the Account aforesaid, in 5000 l. and upwards, prout per Recordum Scaccar', &c. & superinde taliter processum fuit in Cur. Scaccar' prædict', that upon the 24th of November aforesaid, a Writ of Extendi facias was awarded to the Sheriffs of London against the said Calvert for the said 5000 l. commanding him to enquire per Sacramentum proborum & legalium hominum, &c. what Goods, Chattels, Debts, Specialties, Sums of Money, &c. the said Calvert then had, and to extend and seise them into the King's Hands, in whose Hands soever they then were, that the King might be thereout satisfied of the said Debt juxta formam Statuti pro hujusmodi deb. dicti Domini Regis recuperand', which Writ was returnable the 26th of the said November, and upon the 24th was delivered to the then Sheriffs of London, who upon the 25th Day of the said November, by Virtue of the said Writ, took an Inquisition per Sacramentum, &c. by which it was found, that the said Defendant Cramlington, upon the 24th of the said November, was indebted to the said Calvert in 500 l. for Money received by him to the Use of the said Calvert, and that the Defendant made a Bill of Exchange, dated the 10th of the said November, directed to the said Ryder, to pay to the said Price to the Use of the said Calvert, the Sum of 500 l. and that the same was due to the said Calvert at the Time of the Inquisition taken, and that the said Sheriffs did thereupon seise the Debt and Bill of Exchange into the King's Hands secundum exigentiam brevis prædict', and returned the said Writ and Inquisition, &c. into the Exchequer, prout per Recordum, &c. plenius apparet; by Virtue of which the King became law-

fully entitled to the said 500 l. and Bill of Exchange aforesaid.

And the Defendant further saith, That afterwards (scilicet) the 9th of December Anno primo, &c. a Writ of *Extendi facias* was awarded out of the said Court of Exchequer against the said Defendant Cramlington, for the said 500 l. and thereupon he paid the said 500 l. upon the 15th Day of January Anno primo supra dicto, to the Use of the King, in plena exoneratione & satisfactione prædict' ult' mentionat' brevis de *extendi fac'* & prædict' Billæ excambii & summæ quingent' librarum per Inquisitionem præd' sic ut præfertur compert', &c. and concludes with Averments, viz. That he the Defendant Cramlington is the same Person named with him in the Extent, and that the 500 l. the Bill of Exchange, &c. in the Inquisition found, are the same with them mentioned in the Declaration, &c. and so demands Judgment of the Action.

To this the Plaintiffs demurred.

And after divers Arguments, Judgment was given in the King's Bench for the Plaintiffs, in Easter-Term in the first Year of King William and Queen Mary.

And now it came to be argued upon a Writ of Error in the Exchequer-Chamber.

First it was alledged for Error, that the Custom is laid too general, (viz.) not only to extend to Merchants but all others, so that it must be at the Common Law, if to be allowed at all.

Sed non allocatur; For in the Case of Sarsfield and Witherley (lately adjudged) it was resolved, That a Person not being a Merchant, drawing a Bill of Exchange, was bound according to the Usage amongst Merchants, and in Declarations upon Bills of Exchange, the whole Matter is to be set forth specially.

2dly, There was (as appears by the Bill of Exchange) twenty-five Days given for the Payment of it after the Date of the Bill, whereas here the Request and Refusal is upon the 25th Day after the Date.

Sed non allocatur; For as the Bill is set forth, it is to pay the Money *Ad viginti & quinque dies post datum*, and this cannot be, if not paid the five and twentieth Day.

3dly, The Matter chiefly insisted upon for Error was, That the 500 l. was appointed to be paid to Price for the Use of Calvert, so the Right and Interest of the Money was in Calvert, by whomsoever it should be received, and then



then it might well be seised for the Debt which Calvert did owe to the King.

But the Court held, That the Seizure for the King ought not to have been in this Case.

1. For that tho' it were to be paid for Calvert's Use, yet this was but a Trust, and the Right of the Money was in Price. As if Goods be given to A. to the Use of B. the Property of the Goods is in A. otherwise if Money be delivered to A. to pay B. there the Right of the Money is in B. and he may bring an Action of Debt.

2. Here the Bill is endorsed over to be paid to the Plaintiffs, before any Seizure, or the Writ of Extent was issued forth, and the Custom is expressly laid, that an Endorsement might be, as in the Case here, which Custom is confessed, and that determines the Right and Interest in the Money of him that makes the Endorsement, and puts it in the Plaintiffs.

Wherefore the Judgment was affirmed.

Witherley *versus* Sarsfield. Mich. 1 W. & M.

( 2. )  
Show. 125,  
127.

A Writ of Error was brought in the Exchequer-Chamber upon a Judgment in B. R. Where the Plaintiff declared in Case, on the Custom of Merchants, That if any Merchant, or other trading Person, make and direct any Bill of Exchange to another, payable to a Merchant or any other trading Person, and the Bill be tendered, and for Want of Acceptance protested, in such Case the Drawer by the Custom is chargeable to pay, &c. That the Defendant at Paris in France did draw a Bill on his Father here in London, payable to the Plaintiff, and the same was presented but refused, and he according to Custom protested the Bill, whereby the Defendant became chargeable, and in Consideration of the Premises did assume, &c. To this the Defendant pleaded, That he was a Gentleman, the Son and Heir of Dr. Thomas Witherley, and at the Time of Drawing the Bill was a Traveller, and at Paris for his better Education; and that he was no Merchant, nor Trader, nor did ever deal as such, and he was then at Paris as a Gentleman and Traveller, as aforesaid, absq; hoc, that he is or ever was a Merchant, &c. The Plaintiff demurs to the Defendant's Plea, and shews for Cause, that it amounts to the General Issue, is double and uncertain, &c.

Holt C. J. It is not every Plea that amounts to a general Issue that is ill; and the Custom is the Foundation, and the Plea is an Answer to that, and therefore well enough. But this Drawing a Bill must surely make him a Trader for that Purpose, for we all have Bills directed to us, or payable to us, which must be all avoidable if the Negotiating a Bill will not oblige the Drawer of it.

The Judgment for the Defendant was reversed: And <sup>Yelv. 76.</sup> the Plaintiff had Judgment in B. R. upon a Remittitur.

*Darrach versus Savage.* Pasch. 2 W. & M.

**I**Ndebitat. Assumpsit for 40 l. received to the Plaintiff's Use, the Defendant pleaded Non Assumpsit; and upon the Trial the Evidence was a Bill of Exchange or Note under the Defendant's Hand, dated the 22d of Feb. 1687: directed to a Merchant in London, Pray pay to Mr. John Darrach, or his Order, the Sum of 40 l. and place it to my Account, Value received, Witness my Hand. The Money was never demanded of the Merchant till the Action brought; and it was insisted for the Plaintiff, that the Defendant was still chargeable, and so continued to be till the Note was discharged.

Holt C. J. In this Case the Bill or Note should be deemed Payment, and that the Plaintiff was satisfied with the Merchant as his Debtor, if he did not within convenient Time resort back to the Drawer for his Money: For his keeping the Bill so long, was an Evidence that he thought the Merchant good at that Time, and that he agreed to take him for his Debtor.

Judgment for the Defendant.

*Mogadara versus Holt.* Mich. 3 W. & M.

**I**N Case on a Bill of Exchange, the Plaintiff sets forth, <sup>(4.)</sup> That there is a Custom, that if any Merchant in London draw his Bill or Bills upon any Merchant in Rotterdam, payable to any Merchant, or Order, and if the Merchant there accept any such Bill, and before Acceptance, or after, the Merchant, to whose Order the Money is directed to be paid, doth indorse it to any other Merchant, and that other Merchant doth indorse it to some other, and the Merchant, to whom the Bill is directed, accepts it after <sup>Show. 317, 319.</sup>

such Indorsement, and fails in Payment to the Merchant to whom indorsed at the Time limited, whereby the Bill becomes protested, and Notice is given thereof to the Drawer; that in such Case, the Drawer becomes liable to pay the same with Damage to the Indorsee. That the Defendant drew a Bill of Exchange, 9 Novemb. 1688. on Edward Williams, payable in two Months and half, to the Order of one Hartopp for 300 l. Value of himself; and Hartopp the same Day indorsed it to Marques, and Marques indorsed it to the Plaintiff; that the Plaintiff afterwards, viz. 8 Feb. 1689. gave Notice to Williams, and he then accepted the Bill; that Williams failed to pay it, and by Reason thereof the said 8 Feb. the Bill was protested, of which Protest the Defendant had Notice the 28th of April, and did not pay it; Ad dampn', &c.

The Defendant demurr'd generally to the Declaration, the Bill not being accepted 'till after the Day of Payment was expired; and it was insisted, That the Protest should have been for Non-acceptance within the Time, and Failure of Payment at the Time.

- 2 Roll. Rep.  
113.  
Yelv. 136.  
1 Vent. 152.  
2 Keb. 695.

By Holt C. J. The Law of Merchants made him liable, who was the Drawer of the Bill, tho' the Acceptance were after the Day; for it need not be tendered within the Time. Now by that Law the Drawer is chargeable by the Value received; and tho' the Money were not paid, or the Bill presented within the Time mentioned, yet it ought still to be paid: But if the Party do not tender and protest at the Day, and there be a Break in the mean Time of the Person on whom the Bill is drawn, he loseth his Money; otherwise if there be no particular Damage.

Judgment was given for the Plaintiff.

### Clerk *versus* Mundal. 3 W. & M.

- (5.)  
3 Salk. 68.

**T**HE Defendant having a Bill of Exchange, and being indebted to the Plaintiff indorsed the Bill to him; afterwards the Plaintiff brought an Assumpsit against the Defendant, who pleaded Non Assumpsit, and at the Trial gave in Evidence this Bill of Exchange indorsed to the Plaintiff, and that it had been so long in his Hands after it became due and payable, and therefore he accounted it as Money paid.

Holt C. J. A Bill without Payment of Money, shall never go in Satisfaction of a precedent Debt or Contract,



if 'tis not Part of the Contract; as if A. sells Goods to B. and it is agreed between them, that A. shall have a Bill of Exchange in Satisfaction for the Goods, in such Case B. is discharged, tho' the Money should never be paid, for the Bill it self is Payment: But otherwise a Bill shall never extinguish a precedent Debt.

Steward *versus* Hodges. Hill. 4 W. & M.

A Bill of Exchange is made to A. B. or Bearer, A. B. indorses it, and the Indorsee brought an Action; and upon a Demurrer, adjudged that it did not lie; for it cannot be indorsed, it not being made to A. B. or Order, and the Bearer cannot have an Action upon a Bill of Exchange; for he has no Interest as Bearer; but it being paid to the Bearer, it is sufficient Payment to discharge the Party who pays it; but it does not give the Bearer such an Interest that he can maintain an Action. ( 6. ) Skinn. 332.

And Holt C. J. said, That Indebitatus Assumpsit does not lie upon a Bill of Exchange, and he cited London's Case to this Purpose; but this was afterwards adjudged for the Plaintiff. Skinn. 346.

Anonymus. Pasch. 5 W. & M.

A Bill of Exchange is drawn by J. S. upon J. B. and accepted by him, payable to J. D. who indorses it to J. G. and he indorses it over; and an Action upon the Case is brought by the last Indorsee against the first Indorser. ( 7. ) Skinn. 343. 5 Salk. 68.

By Holt C. J. The Action well lies; for the Indorsement is quasi a new Bill, and a Warranty by the Indorser, that the Bill shall be paid: And the Party may bring his Action against any of the Indorsers, if the Bill be not paid by the Acceptor. But it has been held, where a Bill of Exchange is made payable to W. R. or Order, and he indorses it to another, the Indorsee cannot sue W. R. unless he attempt to find out the first Drawer to demand the Money of him, which must be set forth in the Declaration; and the Indorser is only liable upon the Drawer's Default of Payment. 3 Salk. 70.

A Bill of Exchange is in Law no Specialty.

Hill *versus* Lewis. Hill. 5 W. & M.

( 8. )  
Skinn. 410,  
411.

**I**N an Action on the Case upon several Promises, grounded on a Bill drawn by a Goldsmith, payable to J. S. who indorsed it to the Plaintiff, who accepted it, and paid on the Account of the Indorſor 800 l. &c. The Indorſements were about eleven o'Clock, and the Drawer continued solvent, and paid Money all that Day after; and it was said, that it was the Neglect of the Plaintiff, not to receive the Money on the Bill, when the Drawer was solvent, as he was all the same Day, but he absconded and removed about two o'Clock the next Morning; also it was said, that by the Custom of Bankers this Bill being entred and accepted as Cash by the Plaintiff, who was a Goldsmith, as was likewise the Drawer, the Indorſor is discharged.

Mod. Caf. 37.  
1 Salk. 132.

Per Holt C. J. Every Bill is extant 'till there has been Satisfaction upon it, and the Drawer is liable, and so are generally all the Indorſors; and therefore the Indorſor here is chargeable, if there be not a Default in the Plaintiff: But if there was a Default in the Plaintiff, so that he might have received the Money, and neglected it, in such Case the Acceptance of the Bill by the Plaintiff is an Agreement, That Payment should be made by the Drawer to him, and the Payment by the Drawer not being made, by his Default in not demanding of it in convenient Time, the Indorſor shall be discharged, and the Loss be to the Plaintiff the Acceptor. Indeed without such Default, the Plaintiff having paid so much on the Credit of the Bill, he ought to have Satisfaction, and a Paper Payment is not any Satisfaction; but what shall be a convenient Time to demand the Money upon a Bill, the Law had not determin'd, and was according to Usage among Traders, and he refer'd that to the Judgment of the Jury who were Merchants: He said that upon a Foreign Bill there were three Days allow'd, but for a Goldsmith's Bill he did not know any definite Time; if after a Foreign Bill be due, the Acceptor becomes insolvent within three Days, the Bill may be protested for Non-payment, but after it is at the Peril of the Drawee: And upon mature Consideration the Jury found for the Plaintiff.

Judgment for the Plaintiff.

Note; Altho' a Bill made payable to J. S. or Bearer, be not indorsable; yet if it be indorsed, the Indorser shall be charged, because every Indorsement is as a new Bill: And if a Man writes on the Back of a Bill of Exchange, This is to be paid to J. S. or the Content of this Bill is to be paid to J. S. and sets his hand to it, it will be a good Indorsement. Farell. 87.

Anonymus. Pasch. 6 W. & M.

Per Holt C. J. **T**IS the Course of the Court to give Interest in Damages upon a single Bill, or Bill of Exchange, (which must always be under the Sum laid in the Close of the Declaration,) in Case of a Demurrer in Debt, and there needs no Writ of Inquiry. (9.)  
Com. 243.

Holt C. J. A Judgment may now well be entered in the Vacation as of the precedent Term, and no Mischief to Purchasers, since the Statutes of Frauds; before it was doubtful. A Release of Errors before Judgment entered is good, where Judgment is entered afterwards of the precedent Term. 244

Lambert *versus* Oakes, at Guildhall. Mich.  
10 W. 3.

**R.** Drew a Bill payable to O. or Order; O. indorses it to L. and L. brings Action for the Money against O. and Holt said, that he ought to prove that he had demanded or endeavour'd to demand his Money of R. before he could sue O. on Indorsement; so if the Bill was drawn on any other Person, payable to O. or Order, the Demand to intitle L. to his Action, ought to be after the Indorsement. 2. O. indorsed this Bill blank to L. by Writing his Name only; and therefore it was urged, that this was a Sale of the Bill, and the Indorsement could not subject the Indorser to an Action. But per Holt, The Indorsement, tho' upon Discount, will subject the Indorser to an Action, because it is a conditional Warrant of the Bill, and makes a new Contract, in Case the Person on whom it was drawn do not pay. 3. If a Man indorses a Bill blank to B. he puts it in the Power of B. to superscribe what B. pleases. 4. If Indorsee (10.)  
Cases W. 3.  
244.



## 118 BILLS of EXCHANGE.

does not demand the Money of the Drawee in a convenient Time, and after he fails, the Indorſor is not liable. 5. If the Action be brought againſt Indorſor, it is not neceſſary to prove the Hand of the Drawer, for tho' it be forged, the Indorſor is liable.

Anonymus. Mich. 10 W. 3.

( 11. )  
1 Salk. 126.  
3 Salk. 71.

**A** Bank Bill payable to A. B. or Bearer, was loſt, and found by a Stranger, who transfer'd it to C. D. for a valuable Conſideration, and C. D. got a new Bill in his own Name, after which Action of Trover was brought againſt him by A. B.

Cro. Eliz.  
723.  
Cro. Jac. 637.  
Hard. 111.

Holt C. J. held, That A. B. might have Trover againſt the Stranger who found the Bill, for he had no Title, tho' the Payment to him would have indemnified the Bank; but A. B. cannot maintain Trover againſt C. D. who obtain'd the Bill on a valuable Conſideration, which by the Courſe of Trade creates a Property in the Assignee or Bearer.

Hart *verſus* King. Mich. 11 W. 3.

( 12. )  
Caſes W. 3.  
309, &c.

**A** Bill of Exchange was proteſted, and loſt, and Action brought againſt Drawer; and it was proved that Deſendant had own'd he had drawn the Bill; and held good by Holt; and he ſaid, that this being an outlandiſh Bill, Drawer was made liable by the Proteſt; but no Proteſt neceſſary in Caſe of inland Bill.

Lambert *verſus* Pack. 11 W. 3.

( 13. )  
1 Salk. 127,  
128.

**I**N Action on the Caſe brought upon a Bill of Exchange by the Indorſee againſt the Indorſor, it was held by Holt C. J. That there is no need to prove the Drawer's Hand to the Bill, for tho' it be a forged Bill, the Indorſor is bound to pay it; but the Plaintiff muſt prove that he demanded it of the Drawer, or him upon whom it was drawn, and that they refus'd to pay it, or elſe that he ſought after them, but could not find them; becauſe otherwiſe he cannot reſort to the Indorſor: And this muſt be done in convenient Time; for if they ſtand and are reſponſible a con-

venient

venient Time after the Assignment, and no Demand is made, the Indorsee shall not charge the Indorser. It is a Question whether Notice must be given, or no; but 'tis fair to give Notice: And the Demand must be proved subsequent to the Indorsement.

If a Ban indorses his Name upon the Back of a Bill with a Blank, he puts it in the Power of the Indorsee to make what use he will of it; and he may fill it up with an Assignment to Charge the Indorser, or use it as an Acquittance to discharge the Bill.

Ford *versus* Hopkins. 12 W. 3.

**A**ction of Trover was brought for Lottery-Tickets; and upon Evidence it appear'd, That the Plaintiff had given the Tickets in Question to a Goldsmith to receive the Money due on them, who had given a Note to pay him so much, &c. And it was insisted on, that this Note under the Goldsmith's Hand could be no Evidence: But it was allowed to be read.

And Holt C. J. said, That the Way and Manner of Trading is to be taken Notice of, and the best Proof that the Nature of the Thing will afford, is only required: When Goldsmiths give their Notes, no Witnesses are by; and their Notes to pay Money, are Evidence of the Receipt of Money. If a Sum of Money is stolen and paid to another, the Owner of the Money can have no Remedy against him that received it: But if Bank-Notes, Exchequer-Notes, or Lottery-Tickets, &c. are lost or stolen, the Owner has such an Interest or Property in them, as to bring an Action into whatsoever Hands they are come; for Money or Cash is not to be distinguished, but these Notes or Bills are distinguishable, and they have distinct Marks or Numbers on them.

A Verdict was given for the Plaintiff.

Butler *versus* Crips. Trin. 2 Ann.

Per Holt C. J. **P**AY to me or my Order so much, is a Bill of Exchange, if accepted; and this is the only Way to make a Bill of Exchange without the Intervention of a third Person.

(14.)  
1 Salk. 283,  
284.

Farell. 129.  
Mod. Cases  
225, 248.

(15.)  
1 Salk. 130.  
S. C. Mod.  
Ca. 29. by  
Name of  
Butler v Crips.

Ward

Ward *versus* Evans. Mich. 2 Ann.

(16.)  
Mod. Cafes  
36, 37.  
2 Salk. 442.  
5 Mod. 398.

A Case made before my Lord Chief Justice Holt at Guildhall was this: Ward the Plaintiff sent his Servant to receive a Note of 50l. of B. who went with him to the Defendant Sir Stephen Evans's Shop, and he indors'd off 50l. upon a Note of 100l. which B. had upon him, and gave the Servant a Note of 50l. upon one Wallis a Goldsmith, to whom the Note was carried the next Day by Ward's Servant: But Wallis refused to pay, and that Day broke; and thereupon the Note was sent back to Evans, who refused Payment, on which an Action was brought; and the Question was, Whether it would lie against the Defendant, or that this were a good Payment by Evans to the Plaintiff.

3 Lev. 252.  
Winch 24.  
Moll. Li. 2.  
c. 10.  
Hob. 154.  
Cumber. 451.

Holt C. J. It is plain the Servant was sent by his Master to receive the Money, and not the Bill: And if the Servant upon Tender of the Bill had come to the Master to know his Mind, and the Master had sent him back for the Money, if then he had took the Bill, that would not have bound the Master; but here was some Time for the Master to assent to what the Servant had done: But he held clearly, that this Indorsement by Evans on the Note of B. was a Receipt by him of so much Money to the Use of the Plaintiff, for which an Indebit. Assump. would lie. And they all agreed, that if a Master send his Servant to receive Money upon a Goldsmith's Bill, or any other, and he takes another Bill upon another Person for Payment, that shall not bind the Master without some subsequent Act of Consent; as if he would not send back the Bill in reasonable Time, &c. but Acquiescence, or any small Matter, will be Proof of the Master's Consent, and that will make the Act of the Servant the Act of his Master.

A Goldsmith's Note is received conditionally, if paid; and not otherwise, without an express Agreement to be taken as Money: And the Party having such Note shall have a reasonable Time to receive the Money, as in this Case, the next Day, and is not obliged as soon as he receives the Note to go straight for his Money.



Boroughs *versus* Perkins. Trin. 2 Ann.

A Writ of Error was brought of a Judgment upon Nil dicit in C. B. in an Action of the Case against the Drawer of an inland Bill of Exchange; and it was objected by the Counsel for the Plaintiff in Error, That since the Act 9 & 10 W. 3. no Damages shall be recovered against the Drawer upon a Bill of Exchange without a Protest, and therefore the Action lies not, here being none in this Case.

( 17. )  
Mod. Caf. 80.  
1 Salk. 131.

By Holt C. J. In inland as well as foreign Bills of Exchange, the Person to whom it is payable must give convenient Notice of Non-payment to the Drawer; for if by his Delay the Drawer receive Prejudice, the Plaintiff shall not recover: A Protest on a foreign Bill was Part of its Constitution; and on inland Bills a Protest is necessary by this Statute, but it was not at Common Law: Yet the Statute doth not take away the Plaintiff's Action for Want of a Protest, nor does it make it a Bar thereto; but this Statute seems to take Place only in Case there be no Protest to deprive the Plaintiff of Damages or Interest, and to give the Drawer a Remedy against him for Damages, if a Protest be not made.

9 W. 3. c. 17.  
1 Lill. Abr.  
234.

Quod Powel J. concessit, and that a Protest was never set forth in the Declaration.

Popley *versus* Ashley. Pasch. 3 Ann.

THE Defendant took up several Goods of the Plaintiff, who sent his Servant with a Bill to him for the Money; the Defendant orders the Servant to write him a Receipt in full of the Bill, which he did, and thereupon he gives him a Note upon a third Person, payable in two Months: The Master sent several Times to the third Person to present him the Note, but could not get Sight of him within the Time; the Party breaks; and all this appearing on Evidence, and that the Defendant went to Sea the next Day after he gave the Note; now this Action was brought against the Defendant for the Money.

( 18. )  
Mod. Cases  
147.

Holt C. J. If a Man give a Note upon a third Person in Payment, and the other takes it absolutely as Payment; yet if the Party giving it knew the third Person to

be breaking, or to be in a failing Condition, and the Receiver of the Note uses all reasonable Diligence to get Payment, but cannot, this is a Fraud, and therefore no Payment; and here was no Laches in the Plaintiff, for the Party failed before the Money was payable.

The Chief Justice directed for the Plaintiff.

## B O N D S.

Cromwell *versus* Dresdale. Mich. 8 W. 3.

( 1. )  
3 Salk. 73.  
2 Salk. 463.

**T**HE Plaintiff declared on a Bond delivered after the Day of the Date, without mentioning the Date; and by Holt C. J. Where the Delivery of the Bond was after the Date thereof, the Plaintiff must declare generally of a Bond dated of such a Day, but with a *Primo* deliberat' upon such a Day; for otherwise it shall be intended to be delivered on the Day it is dated. If A. B. declares on a Bond, as bearing Date the 6th of May, he cannot upon *Non est factum* give in Evidence a Bond bearing Date at another Day; but he may such Bond of a certain Date, tho' it was delivered on another Day. If a Bond has no Date, the Plaintiff must nevertheless declare upon it as made at a certain Time.

Yelv. 193.  
1 Brownl.  
310.  
Style 414.  
Noy 21.

Marle *versus* Flake. Trin. 12 W. 3.

( 2. )  
3 Salk. 118.

**I**F an Obligor plead Payment of a Bond with Condition thereon endorsed, it is a good Plea before Breach, but not afterwards, no more than to an Action of Debt upon a single Bill; for when the Breach is made, the Benefit of the Condition, which is always in Behalf of the Obligor, is gone and extinguished. A Condition of a Bond being under-written or indorsed, if it be impossible, there that is only void, and the Obligation single; but where the Condition is Part of the Lien and incorporated therewith, and the Condition is impossible, the Obligation is void. Per Holt Chief Justice.

## Fitzhugh's Case. Mich. 3 Ann.

**I**N this Case it was held by Holt C. J. That in a Bond (3.)  
 where there is no Demand for the Payment of Money Mod. Caf.  
 at the Day and Place, the Obligor must bring the Money 260.  
 the last Part of the Day to the Place; and if there be no  
 Place appointed, he must seek out the Obligee if he be in  
 England. If a Place be appointed, and he has an Election  
 to do the Thing on or before the Day, he may give Notice  
 to the Obligee to be there at the Day; and if he don't come,  
 and the Obligor is there and tenders his Money, he saves  
 his Bond: And if a Man be bound by Bond to enclose the 1 Inst. 210.  
 Obligee of Lands in York the last Day of November, and 1 Roll. Abr.  
 he stays here in London; yet if the Obligor does not go 443.  
 down and tender, he breaks his Obligation.

Payment of Money on a Bond in Holland on Request, if  
 the Request be in England it will be good.

## Willis's Case. Mich. 6 Ann.

**A**ction of Debt was brought upon a Bond, with Con- (4.)  
 dition for performing such and such Things. 1 Salk. 172.

Holt C. J. If the Condition of a Bond be to levy a  
 Fine in O&ab. Sanct. Hillar. by which Condition the Plaintiff  
 is to sue out the Writ of Covenant, it is not enough to  
 plead, That no Writ of Covenant was sued out; but the  
 Defendant must plead, that he was there ready at the Day,  
 &c. and no Writ of Covenant was sued. And so if one 8 Ed. 4.  
 be bound to pay Money to J. S. at a certain Time and Place, 2 Cro. 243.  
 it is not sufficient for the Defendant to say, that the Obli-  
 gree came not at the Time, without saying that he was there  
 ready to pay the Money; for he must shew he hath done all  
 that could be done on his Side towards a Performance.

If a Bond be of twenty Years standing, and no Demand Mod. Caf.  
 is proved to be made thereon, or good Cause shewn of so 22.  
 long Forbearance, upon a Solvit ad diem it shall be intended  
 paid; à fortiori upon a Note, if it be for any considerable  
 Sum.

See Usury.



## Borough English and Gavel-kind Lands.

Clement *versus* Scudamore. Hill. 2 Ann.

( I. )  
Mod. Caf.  
120, 121,  
122.

**A** Special Verdict was in Ejectment, finding that the Lands in Question were Copyhold, and Part of the Manor of Croyden in Surry, of the Nature of Borough English, and that the Custom of the Manor was, That all Copyhold Tenements of that Manor did and ought to descend to the youngest Son and his Heirs. That F. W. had five Sons, the youngest whereof died in the Life-time of the Father, leaving Issue a Daughter; after which the Father purchased the Lands in Question, and was thereunto admitted, to hold according to the Custom of the Manor. The Father died seised, and the fourth Son entered, upon whom the Daughter of the fifth Son entered, and made a Lease to the Plaintiff: And now the Question was, whether the fourth Son, being the youngest at the Time of the Father's Death, or the Daughter of the fifth Son, dying in the Life of the Father, should inherit these Lands? And it was insisted, that she had good Title as the Representative of her Father, who, if he had lived, would have inherited as Heir to his Father.

Co. Lit. 110,  
140.  
Cro. Jac.  
198.  
Cro. Car.  
411.  
Dyer 196.  
4 Leon. 242.  
2 Sid. 61.  
Noy 15, 106.  
1 And. 191.  
2 Lev. 87.  
1 Mod. 96,  
97, 102.

Holt C. J. The Custom of Borough English is for the youngest Son to inherit, and by this Custom the youngest Son is put in the Room and Stead of the eldest at Common Law; for as an Inheritance by the Common Law shall descend to the eldest Son, so by this Custom it shall go to the youngest, without any Difference. Therefore since Custom alters the Descent from the eldest to the youngest Son, there is the same Reason that the Representative of the youngest Son shall take in this Case, as there is at Common Law for the Representative of the eldest. And there ought not to be any Difficulty herein; for it appears, that all the Lands in England before the Conquest, and for some Time after, were generally Gavel-kind, which descended to all the Sons equally, and were dividable between them: But afterwards, for the better Strength and Support of the Crown, Knight-Service Te-

nure

nure was introduced, and the Course of Descent altered, so that the whole was made descendible to the eldest Son, to the Intent that these Tenants, who by their Tenure were to attend on the King in his Wars, might do it with more Dignity and Grandeur. And in this Instance the ancient Saxon Law was altered; but notwithstanding the eldest Son was hereby preferred before the youngest, and the Male before the Female, yet the Right of Representation remained, as it doth to this Day. This Right of Representation has been considered in all Nations; an Account of it is given in the ancient Law of Israel, and it was always practised by Greeks and Romans, even by the Law of the Twelve Tables: And in this Kingdom, Representation has not only Place in Inheritances descendible according to the Course of the Common Law, but holds also in Inheritances descendible according to Custom: For in Case of Gavelkind, which we know to be the Custom of Kent, if a Man have three Sons, and purchase Lands, and the youngest Son dies in the Life of the Father, leaving Issue a Daughter, no Doubt the Daughter shall inherit; and there is no Difference between Gavelkind and Borough English, but secundum majus & minus; in Gavelkind all the Sons take all, in Borough English the youngest Son takes all, and the Law takes Notice of both these Customs, which is allowed in the Case of Fane and Barr in C. B. Hill. 1659. In this Case, the Custom as found is, that the Land is of the Nature of Borough English, and did and ought to descend to the youngest Son and his Heirs; it is not only that it should descend to the youngest Son, but to him and his Heirs: And if a Father be disseised, or make a Feoffment during Infancy, the Right of Entry shall descend to the youngest Son, and if he die before Entry, it shall descend to his Daughter, though the Father died not seised of the Land.

8 Rep. 43.  
Jones 361.  
1 Cro. 410.

If Borough English Land descends to an Heir under Age, and a real Action is brought against him, he shall have his Age, or Parol Demurrer, as in Case of Inheritance at Common Law; and what Reason can there be, why this Land should have those Qualities, and not the other, as Representative Right? The Court were all of Opinion, the Daughter had good Title.

Judgment for the Daughter.

## B O T T O M R Y.

Williams *and* Steadman. Pasch. 5 W. & M.

Skin. 345.

**D**E B C upon a Bond upon Bottomry; the Defendant pleads that the Ship went from London to Barbadoes sine deviatione, and afterwards she returned from Barbadoes towards London, and in her Return she was lost in Voyagio prædict; the Plaintiff replies, that the Ship in her Return went from Barbadoes to Jamaica, and that after a Stay there, she returned from Jamaica towards London, and was lost, and so shews a Deviation. The Defendant rejoins, that she was pressed into the King's Service, and so compelled to go to Jamaica, which is the Deviation pleaded by the Plaintiff; absque hoc, that she deviated after her being pressed, &c. The Plaintiff demurred; & per Curiam adjudged for the Plaintiff. First, the Bar of the Defendant is not good; for he pleads that the Ship went from London to Barbadoes without Deviation, and that in the Return from Barbadoes to London she was lost in the Voyage aforesaid, but does not shew without Deviation; for the Condition is so in express Words; and he ought to shew expressly that he had performed the Words of the Condition; and tho' it be said in Voyagio prædict, and it cannot be in Voyag' prædict if she had deviated, and so it is implied.

Pet Holt C. J. said, that to plead such a Batter which would be a Performance of a Condition by Implication, is not sufficient. 3 Cro. 234. Tedcastle's Case.



## B R E A C H.

Ormond, *Duke, versus* Bierly. Pasch. 11 W. 3.  
Rot. 76.

**I**N an Action upon a Bond in Replevin to prosecute his Suit with Effect, and also to make Return, &c. The Defendant pleaded, that E. G. did levy a Plaintiff in Replevin in the Court before the Steward of Westminster; and that afterwards, and before the Suit was determined, (viz.) on such a Day, &c. E. G. died, per quod the Suit abated. The Plaintiff replied, quod bene & verum est, that E. G. levied such a Plaintiff, and that the Defendant immediately afterwards exhibited an English Writ in the Exchequer against the Plaintiff in that Suit, and by Injunction hindered the Proceedings below until such a Day, &c. on which Day the said E. G. died, so that he did not prosecute his Suit with Effect. Upon a Demurrer to this Replication, the Defendant had Judgment; for per Holt C. J. this was a Prosecution with Effect, because there was neither a Nonsuit or Verdict against E. G.

(1.)  
Garthw 519,  
520.  
1 Salk. 99.

Harman *versus* Owden. Mich. 12 W. 3.

**C**ASE, for that the Defendant in Consideration of 20 l. promised to deliver, on or before the 5th of January, twenty Quarters of Corn, out of a Ship into a Barge to be brought by the Plaintiff to receive the said Corn; and assigns for Breach, That the Defendant non deliberavit, &c. super dictum quantum diem Januarii. Defendant pleaded Non Assumpsit, and Verdict for the Plaintiff. It was moved in Arrest of Judgment, that the Defendant might have delivered the twenty Quarters before the 5th of January.

(2.)  
1 Salk 140.

After Debate, held per Holt C. J. upon great Consideration, 1st, That this was good without the Verdict; for the Plaintiff was to bring the Barge, and the Defendant was to deliver the Corn into the Barge; so there must be a Concurrence of both Parties. The Defendant could not make a Tender to oblige the Plaintiff to accept before the last

3 Lev. 293.  
2 Vent. 221.

last Day; and therefore since the last Day is the Time appointed, when the one is to deliver, and the other to accept, it shall not be presumed the Plaintiff was there before the Time with his Barge. Vide 2 Keb. 411. 2dly, That it was clearly helped by the Verdict, because if there had been an actual Delivery, it might have been given in Evidence upon Non assumpsit; and in that Case the Jury must have found for the Defendant. Vide 1 Sid. 15. 1 Saund. 228. 1 Vent. 119.

Judgment pro Quer'.

## B R I D G E S.

The Queen *versus* Sir John Bucknell. Mich.  
1 Ann.

(1.)  
Farell. 54,  
55.

**A**N Indictment against the Defendant for not repairing of a certain Bridge, &c. which he was bound to repair, *Eo quod* he was Dominus Manerii de la More; and it being removed hither after Condemnation, it was objected that the Indictment was naught.

Style 400.  
Litch 106.  
Noy 93.

By Holt C. J. A Man is not bound to repair a Bridge because he is Lord of a Manor, but it must be said, that this is some Charge upon the Manor, to oblige him to repair; and that can be only one of these two Ways: First, That he held the Manor by the Service of repairing the Bridge, that is *Ratione Tenuræ*; and this being a Charge upon the Possession, is like any other Service for which the Tenant in Possession is chargeable: And every such Tenant if he be but Tenant for Years or at Will, is bound to repair, and immediately upon his Default he is indictable. The other Way of Charge is by Prescription; and then it must be, that the Tenant, and all those whose Estate he has, did use and were bound to repair the Bridge. But here you neither shew Tenure, or Prescription.

Judgment stay'd per Cur'.

Domina Regina *versus* Saintiff. Mich. 3 Ann.

Holt C. J. said **T**HAT an Indictment lies not for not repairing a Bridge, except it be in a Highway; but the Word Highway is the Genus of all publick Ways, as well Cart, Horse, and Foot-way, and Indictment lies for any one of these Ways, if they are common to all the Queen's Subjects having Occasion to pass there; that is, if it be a Foot-way only common to them all, or a Horse-way, and yet these are not *Altæ Regiæ Viæ*; for that is the Great Highway, common to Cart, Horse and Foot, that please to use it: And if there be a common Foot-way for all the Queen's Subjects, if it be in Decay, an Indictment must of Necessity lie for it; because Action of the Case will not lie, without a special Damage. But the Word Commune does not *ex vi Termin* import that it is common to all, as it ought to do to maintain this Indictment; and here it is not said to whom it is common.

(2.)

Mod. Caf.

255.

Staundf. 96.

1 Hawk. P. C.

201.

It has been held, that of common Right the County are bound to repair publick Bridges; tho' a particular Person, Town, &c. may for a special Cause, as by Tenure or Prescription, be obliged to repair them. But the Inhabitants of the whole County cannot of their own Authority change the Bridge or Highway from one Place to another; for that cannot be done without Act of Parliament.

Mod. Caf.

397.

Buildings, Lights, &c. Vide Nufance.

B Y - L A W S.

Robinson *versus* Grofcot. Trin. 8 W. 3.

**U**PON a Habeas Corpus it was returned, that the City of London was an ancient City, and that there was a Custom temps dont, &c. to make By-Laws where there was not sufficient Remedy. That at a Common Council such a Day, &c. an Order was made, reciting that the Company of Binckreels were an ancient Company, and that great Mischief and Debauchery,

Com. 372,

373.



chery, &c. happened, for that several Foreigners had set up Dancing-Schools; wherefore it was ordered, that all Persons using those Arts, not being Free of that Company, should, upon Notice by Summons of the Beadle, accept their Freedom; and if they failed so to do, then after such a Day, to forfeit 10 l. to be sued for in the Name of the Chamberlain, and one Half of the Forfeiture to be to the Mayor and Commonalty, and the other Half to the Company of Musick-Masters. They set forth that their Customs were confirmed by Parliament, and particularly by the Stat. R. 2. and that the Plaintiff brought an Action of Debt in the Lord Mayor's Court upon this By-Law.

Nota; The Action was brought upon another Branch of the By-Law.

The Court held the By-Law to be naught, to oblige Dancing-Masters to be of the Company of Musicians.

Holt C. J. said, The Musicians were no Corporation; they are a Brotherhood, or Club, to meet and drink and talk together, that's all. The City might make a Guild or Fraternity of Dancing-Masters, (tho' they cannot make a Corporation) and then it were reasonable to oblige Dancing-Masters to be of that Company, but not of a Foreign Company: A Dancing-Master might be of another Company before; which, tho' it were not this Case, yet if any such Case may happen, the By-Law is not good. The By-Law should be mended throughout. The City hath nothing to do to set Rates and Prices for Dancing.

## Carriers and Coachmen.

Middleton *versus* Fowler. Mich. 7 W. 3.

- (1.)  
 Skin. 625.  
 1 Salk. 282.  
 2 Salk. 423.  
 1 Mod. 198.  
 3 Lev. 258.  
 2 Saund. 115.  
 4 Leon. 123.  
 1 Show. 29.  
 Hob. 206.

**T**HE Plaintiff brought Trover against the Defendant, who was a Stage-Coachman, where Goods were delivered to his Servant; and if this Delivery should charge the Master was the Question?

Per Holt C. J. The Party here does not pay the Master for the Carriage of it, and therefore he shall not be charged. This differs from the Case of a Carrier or Waggoner, who is paid for the Passenger, and for the Parcel also; but in a

Coach

Coach, the Passengers are allowed ten or fifteen Pounds Weight, for their necessary Occasions on the Journey; and if any more be carried for which the Driver is paid, it is privately and by Stealth. Indeed if the Hatter be paid or agree for it, and there be a Loss, then he shall answer it.

The Plaintiff was nonsuited.

*Coggs versus Bernard.* Trin. 2 Ann.

Holt C. J. **A** Common Carrier by Custom or Usage may lawfully claim a Reward: And where a Man carrying Goods is of a Publick Employment, as a Carrier, Hovman, &c. he must answer for all Events, excepting the Acts of God, and the Enemies of the King; and this is a political Establishment, for the Safety of all Persons concerned, and whose Affairs necessitate them to intrust such Carriers. For by this Means all private Combinations between them and Highwaymen and other Robbers, are prevented, which cannot easily be discovered. But he held, if a Bailiff or Factor carries Goods, and is robbed, he is not answerable to the Owner, tho' he hath a Premium; because 'tis only a particular Office, and private Trust, and he doth the best he can, as the Nature of the Thing puts it in his Power to perform it.

(2.)  
3 Salk. 11.

1 Roll. Abr.  
338.  
1 Inst. 78.

CERTIORARI.

*Dr. Sands's Case.* Pasch. 10 W. 3.

**D**R. Sands refused to take the Oaths appointed by Statute 1 W. & M. c. 8. tender'd to him by two Justices of the Peace; this was certified to the Judge of Assize, and by him into the Exchequer, according to Statute 7 & 8 W. 3. c. 27. Now a Certiorari was prayed to remove it hither, suggesting a Surprize and Trick upon Dr. Sands. Also the Case of James Duke of York was cited, who being presented at the Quarter-Sessions upon the 3 Jac. 1. c. 4. for not coming to Church, it was removed hither by Certiorari.

(1.)  
1 Salk. 145.

Hob. 135.  
1 Salk. 149.  
4 Inst. 294,  
295.

But

But Holt C. J. held it could not be granted, because it would evade the Statute; for when it is once in this Court, it cannot be sent back again, and the Party cannot be proceeded against here. The Case of the Duke of York was the only Case wherein it was ever done.

The Queen *versus* Porter. Mich. 2 Ann.

( 2. )  
1 Salk. 149.

**O**n a Certiorari to remove the Indictment, &c. in B. R. after a Conviction for beating certain Officers, on Stat. 14 Car. 2. Northey, Attorney General, moved for a Procedendo, urging that it was inconvenient a Certiorari should be granted after Conviction, and before Judgment; because the Justices who tried the Cause were best able to set the Fine.

1 Salk. 150.  
6 Mod. 17.  
1 Vent. 33.  
1 Sid. 419.

Et per Cur. A Certiorari lies after a Conviction, and before Judgment; for perhaps it may be proper to give Judgment in this Court: And sometimes it happens that a Writ of Error will not lie, however a Writ of Error will lie in this Case, because 'tis a formal Proceeding grounded on an Indictment; and therefore because the Party might have Remedy by Writ of Error, and it was not so proper to set the Fine in this Court, a Procedendo was granted.

Holt C. J. said, That if the Judge of Assize, upon a Conviction there, doubts of the Judgment, he may remove the Record hither by Certiorari; and upon Judgment here, a Writ of Error of a Record coram vobis residen. lies. It is the Course of the Crown-Office, and was so done by C. J. Scroggs.

The Queen *versus* White. Pasch. 4 Ann.

( 3. )  
1 Salk. 150.

**O**n a Certiorari granted to remove an Order of Sessions, for removing a High Constable and putting in another. Sir James Montague moved for a Procedendo, because the Writ was made out on the Saturday before the Term, Telle the 12th of February, and the Fiat was not signed till the first Day of this Easter Term, and a Procedendo was granted for this Irregularity; and it was held that in Certiorari's granted to remove Orders, the Fiat for making out the Writ must be signed by a Judge, and the Writ need not; but in Writs of Certiorari to remove Indictments,

Vid. 1 Lill.  
255.



diaments, the Fiat must be signed and the Writ too; and that the latter is required by the late Act of Parliament.

And Holt C. J. said, That if the Fiat had been signed on the same Day the Writ was taken out, that would have been well, because it was before the Essoign Day; but a Fiat signed this Term, cannot warrant a Certiorari tested the last Day of last Term. Also they held High Constables removable as well as Petit Constables, and the Justices at Sessions were the best Judges of that Matter.

See Convictions, Courts, Error, &c.

## Challenge of Jurors.

Charnock's Case. 6 W. 3.

**O**N an Indictment for High Treason in conspiring the Death of the King, three Persons severally pleaded Not Guilty. (1.) Salk. 87.

And Holt C. J. told them, that each had Liberty to challenge thirty-five of those who were returned upon the Panel to try them, without shewing any Cause; but if they would take this Liberty, they must be tried separately and singly, as not joining in the Challenges: And if they intended to join in the Challenges, then they could challenge but thirty-five in the whole, and might be jointly tried on the same Indictment.

The King *versus* Warden of the Fleet. Mich.

11 W. 3.

**A**T a Trial at Bar of Issues joined, in pleading on a Monitans de droit in Chancery, to an Inquisition returned there, finding several Misdemeanours in the Warden in Duty of his Office, which Office is found to be an ancient Office exercisable in Middlesex; whereby the said Office, and the Prison-House in London, which were found to be appendant to the Office, were forfeited. There were two Issues, one upon the Escapes, the other upon the Appen-

dancy in London; and a Jury of Middlesex being come to the Bar, the Counsel of the Defendant challenged the Array, and had it drawn up in Parchment in French, and read by Counsel. The Cause was, that the Jury ought to come from London, where the House was, and not from Middlesex, and returned by the Sheriffs of London, and not of Middlesex; and concluded & hoc parat' est verificare prout Cur', &c. & petit inde judicium per quod arraiam' cassetur.

Holt C. J. The Matter of Challenge ought not to be to the Court, as here you make it, for you say we have awarded a Writ to a wrong Officer, for the Array is rightly made according to the Writ. If the Sheriff were a Party concerned, it would be a good Cause of Challenge, but we don't take Notice upon the awarding the Ven. Fa. of any such thing, if we are not apprised of it by the Suggestion of the Party; and Want of proper Venue was never yet a Challenge to the Array. If he were a-kind to either Party, or interested, &c. the Venue ought to go to the Coroner at first; but if you insist upon it, you must demur for the King, and they join in Demurrer; and a Demurrer was drawn instantly, and a Joinder in Demurrer, and the Challenge over-ruled.

To prove the Escape, a Witness who had been a Prisoner, and was voluntarily suffered to escape, was produced.

It was objected, that he had given a Bond for his being a true Prisoner, which he had forfeited by escaping; and besides, he had been re-taken. Now by his Evidence, he would make this a Bond of Ease and Favour, and the Re-taking a false Imprisonment; for if the Defendant be convicted upon his Evidence, and after Debt be brought by him on the Bond, the Conviction will be Evidence to make it void, as taken for Ease and Favour. And in an Action of false Imprisonment for re-taking, the Conviction will be likewise Evidende. And it was compared to an Information for usurious Contract, even in the King's Name, the Party to the Contract shall not be a Witness, if the Debt be not paid.

It was answered and resolved by the Court, 1st, That if this were a Bond for true Imprisonment, it would be good; but if for Ease and Favour, void, and an Escape. 2dly, That a Conviction here could be no Evidence against the Warden upon Debt on the Bond, nor for the Prisoner in false Imprisonment against the Warden, because it would not be between the same Parties; for Conviction at Suit

of the King for Battery, &c. cannot be given in Evidence in an Action of Trespafs for the same Battery, nor vice versa: The like Law of an usurious Contract. 3dly, That no Record of Conviction or Verdict can be given in Evidence, but such whereof the Benefit may be mutual, viz. where the Defendant as well as Plaintiff might give it in Evidence. So if the Record had been for the Plaintiff's Advantage, and that they could not give it in Evidence, the Defendant should not give it in Evidence, for that very Reason. This is not like the Case of an usurious Contract, for there the very Bond is a Part of the Crime, and no distinct Act from it; and the Party's coming to prove it is a Discredit to the Bond, it being Part of the Crime. Another Reason was added from the Nature of the Thing, which being a secret Transaction, if any of the Parties concerned be not for the Necessity of the Thing admitted for Evidence, it will be impossible to detect the Practice; as in Cases upon the Statute of Hue and Cry, the Party robbed shall be a Witness to charge the Hundred.

And Holt C. J. said, That though a Feme Covert could not by Law be a Witness for or against her Husband, yet in my Lord Audley's Case, it being a Rape upon her Person, she was received to give Evidence against him.

Another Exception was, that he had been convicted of common Barretery, and the Record was produced, and that he had been fined 100 l. And Holt C. J. said, if he had had the Handling of him, he had not escaped the Pillory; and that he remembered Serjeant Maynard used to say, it were better for the Country to be rid of one Barreter than of twenty Highwaymen. But in answer to the Exception was read the late Statute of 6 & 7 W. & M. which pardoned all the King could pardon. And the Court held, that Pardon made him a legal Witness; and that even the King's Pardon by Charter would make him a legal Witness, tho' such a one as they could not encourage a Jury to believe; and they took this Diversity, viz. that if the Disability be by Act of Parliament, and Part of the Judgment, the King cannot pardon it; but if the Disability be only consequential, the King may pardon it. But the Defendant's Counsel, not being satisfied with the Resolution of the Court upon the first Exception, prayed to have a Bill of Exceptions; whereupon Holt C. J. directed them to draw up their Exceptions.



## CHANCERY.

Holderstafte *versus* Saunders. Mich. 2 Ann.

6 Mod. 16.

**A**N Attorney and some more had got one in quiet Possession turned out thus. He got one to come upon the Land, who assumed the Name of the Tenant in Possession, and owned himself to be the Man, and got the common Affidavit of Service to him by the borrowed Name, having delivered a Declaration to him before, and got Judgment against the casual Ejector, and turned the Tenant, who was wholly ignorant of all, out of Possession. Serjeant Hooper moved for an Attachment against the Attorney, and upon Affidavit of this Matter, all the Accomplices were ordered to attend; for tho' the Court looked upon it as a very great Offence, they would not at first grant an Attachment; but said that it being in a criminal Matter, if Endeavours were used to serve them with a Rule, and they could not be found, upon Affidavit of that Matter, they would grant an Attachment, without requiring personal Service. Then Serjeant Hooper insisted to have it Part of the Rule, That they should not move for an Injunction in Chancery in the mean Time; for that would hinder the further Inquiry of this Practice: But the Court said they could not do that; for that were to send an Injunction into Chancery, but said when the Court had a Hank over a Man, and he came for a Favour to the Court, they often refuse to grant him that, unless he consented not to go into Chancery; and that if after such Consent he would go, they would send an Attachment against him for Contempt.

And C. J. Holt said, Sure Chancery would not grant an Injunction in a criminal Matter under Examination in this Court; and if they did, this Court would break it, and protect any that would proceed in Contempt of it, and he said he thought that a Copy of these Affidavits upon which the Rule was made here, and an Oath of their being a true Copy, ought to be Ground sufficient to stay the Chancery from granting an Injunction.

# CHAPLAIN.

Brown *versus* Mugg. Mich. 12 W. 3.

**T**RESPASS for taking his Tithes in Inkborow; <sup>1 Salk. 161,</sup>  
 a Special Verdict found, that the Defendant be- <sup>162.</sup>  
 ing possessed of the Benefice of Stockton, and a  
 Chaplain extraordinary to the King, was present- <sup>21 H. 1. c. 13,</sup>  
 ed, instituted and induc'd to the Rectory of Inkborow, be- <sup>14.</sup>  
 ing above the annual Value of 8 l. per Annum. That the  
 Benefice of Stockton thereby became void, and the Defen-  
 dant was presented to it again by the King, as upon a  
 Title of Lapse, and instituted and induc'd; and that  
 Stockton was above the Value of 8 l. per Annum. Et per  
 Cur': 1. A Presentation of the King of his own Chaplain,  
 imports a Dispensation, which the King as supreme Odi-  
 nary may grant; and he shall hold a Plurality without a  
 previous Dispensation. But if he be presented to a second <sup>2 Brown. 45.</sup>  
 Benefice by a Subject, he must obtain a Dispensation be-  
 fore his Institution to the second Living. 2dly, A Chap-  
 lain extraordinary is not a Chaplain within the Benefit of  
<sup>21 H. 8. c. 13 and 14.</sup> but only the Chaplain in Ordinary.  
 Judgment for the Plaintiff; affirmed in Cam. Scacc. by a  
 Majority of one. Note; He has no waiting Time, but on-  
 ly an Entry of his Name in the Book of Chaplains. A  
 Chaplain within the <sup>21 H. 8.</sup> ought to be retained under  
 Seal. <sup>3 Cro. 424. Godb. 41.</sup> If the King have a Special  
 Title, and present generally, 'tis void. Hob. 302.

Et per Holt C. J. After Institution and Induction a  
 Presentation by the King is void, tho' it be ad corroboran-  
 dum, but he must obtain a Patent of express Grant.

# CHARTERS.

Trin. 12 W. 3.

Cases W. 3. Holt C. J.  
414.

**W**E never order Charters to be brought into Court on Trials, when Copies of them may be had at the Rolls; but we will compel them to give you Sight of them.

## Church and Church-wardens.

Ball *versus* Cross. Trin. 1 W. & M.

(1.)  
1 Salk. 164.

**U**PON a Prosecution in the Ecclesiastical Court, against the Inhabitants of a Chapelry, for not paying towards the Repairs of the Parish Church; it appeared on the Libel, that they never had contributed, but always buried in the Mother Church, until about the Time of King Henry the Eighth, when the Bishop was prevailed upon to consecrate them a Burial-place, and in Consideration thereof, they agreed to pay towards the Reparation of the Mother Church.

2 Lev. 102.  
1 Jones 89.  
1 Mod. 236.  
2 Mod. 222.  
Farrell. 122.

By Holt C. J. At Common Law, the Parishioners of every Parish are bound to repair the Church; but by the Canon Law, the Parson is obliged to do it: And in London the Parishioners by particular Custom repair both Church and Chancel, tho' the Freehold is in the Parson. Here those of a Chapelry may prescribe to be exempt from repairing the Mother Church, where it Buries and Christens within it self, and has never contributed to it; but in this Case it appears, that the Chapel was only a latter Erection in Ease and Favour of them of the Chapelry, they having buried at the Mother Church till Henry the Eighth's Time, and then undertook to contribute to the Repairs of the same.



Hawkins *versus* Rouse. Mich. 7 W. 3.

**A** Libel was exhibited for not paying to a Church Rate; (2.)  
 the Case was thus: It being presented in the consistory Court of the Bishop, that the Church and Chancel of D. in the City of Exeter was out of Repair, &c. the Church-wardens of the said Parish made a Rate upon the Inhabitants, towards the Charge of Repairing the said Church and Chancel; and also had repaired the Church and Chancel, and beautified the same: But Hawkins, who was a Parishioner, refused to pay his Proportion of the said Rate. The Plaintiff hereupon suggested for a Prohibition, that of common Right the Chancel ought to be repaired by the Parson only; and further, that every Rate for the Repair of any Parish Church, should be made by the Parishioners, or the greater Part of them, and not by the Church-wardens alone, without the others. Carth. 360.  
 5 Mod. 389.  
 2 Mod. 212,  
 254.

Holt C. J. It is by the peculiar Law of this Kingdom, that the Parishioners are charged with the Repairs of the Body of the Church; besides this is one entire Rate, as well for Repairing the Chancel, to which the Parishioners are not liable, as for Repairing the Church to which they are; so that it cannot be distinguished how much was assessed for the Repairs of the one and the other separately: And for these Reasons, a Prohibition was granted to the whole Suit upon this Rate.

Per Cur: Without a Special Custom, the Parishioners are not to repair the Chancel; the Parson is bound to do it of common Right.

*Case of the Parish of St. Swithin in London.*  
 Term. *ibid.*

**A** Suit being brought in the Ecclesiastical Court, upon (3.)  
 a Rate, against the Inhabitants of the Parish of St. Mary, to contribute to the Repair of the Church of St. Swithin, to which the Parish of St. Mary was united by the Act for Rebuilding the City of London: It was moved for a Prohibition, that though by this Act the Churches are united, and this Church is become the Parish-Church to both Parishes, yet the Parishes remain distinct, and the Inha-  
 Skinn. 388,  
 616.

Inhabitants of St. Swithin's cannot make a Tax to charge the Inhabitants of St. Mary's.

22 Car. 2.  
c. 11.

Holt C. J. in arguing the Case said, that there may be a Difference between such an Union made by the Patrons and Ordinary, according to their ordinary Power by Law, and an Union as here made by Act of Parliament; for tho' in the first Case, the Churches are united, such Union does not make one the Parish-Church to the other Parish, but they as to this Respect remain as before; but here the Church is become the Parish-Church of both Parishes, and therefore it may be reasonable that both the Parishes should contribute to the Repairs of it.

This Case was moved again at another Day; and per Curiam, no Prohibition shall go, for now the Church of St. Mary is taken away, and the Church of St. Swithin, by the express Words of the Act, made the Parish-Church of both Parishes, in all Respects as if it had been always so; and it was not the Intent of the Statute to discharge the Parish of St. Mary from contributing to any Parish-Church, as they would be, if they were not chargeable to the Repair of this.

37 H. 8. c. 21.

Holt C. J. here said, That upon an Union at Common Law, or by the Statute of Hen. 8. though one Church be united to another, yet this does not unite the Parishes, or bind the Parishioners of the Church united, to resort to the Church to which the Union is made; but it is only an Appropriation of the one Church to the other, by which the Incumbent, and his Successors of such other Church, shall be Parsons of the Church united, to celebrate Divine Service, &c.

Trin. 13  
W. 3.  
Cases W. 3.  
554.

Holt C. J. Of common Right the Disposition of Pews in a Church belongs to the Ordinary, but the Parish is bound to repair them; and it is only Reliance that makes a Right to a Pew in a Parish; for if one Purchase a Pew there, and after leaves the Parish, his Interest in the Pew is gone; and if he should return again he must renew his Interest; but if a Person ceases to be a House-keeper, but continues still in the Parish as a Lodger, and goes to Church, and is taken Notice of as a Parishioner, his Interest which he had in the purchased Pew continues.

Britton *versus* Standish. Trin. 3 Ann.

**T**HE Parson of H. libelled against Britton, for not coming to his Parish-Church on Sundays, and not receiving the Sacrament at Easter: The Question was, Whether a Parishioner is bound by Law to come to his own Parish-Church, or whether he is excused if he go to some other Church, as it appeared the Plaintiff did?

It was suggested for a Prohibition, that the Determination of the Bounds of Parishes; and the Interpretation of the Laws of the Realm, belonged to the Temporal Courts, and that by them no Man is bound to go to his Parish-Church, so he go to some Church, and the Defendant did constantly resort to another Church. And Day being given by the Court for hearing Counsel of both Sides; it was insisted against the Prohibition, that by the Statute 1 Eliz. c. 2. every Parishioner is obliged to come to his Parish-Church, which Statute is still in Force, and not altered by any subsequent Act, but only by the Act of Toleration in respect to Dissenters: On the other Side it was admitted, that the Words of the Statute 1 Eliz. are, that every Parishioner shall repair to his Parish-Church; but that those Words were corrected or explained by subsequent Statutes, particularly the Statute 3 Jac. 1. c. 4. by which every Parishioner is required to repair to his Parish-Church, or to some other Church.

Holt C. J. Parishes were instituted for the Ease and Benefit of the People, and not of the Parson, that they might have a Place certain to repair to when they thought convenient, and a Parson from whom they had Right to receive Instructions: And if every Parishioner is obliged to go to his Parish-Church, then the Gentlemen of Grays-Inn and Lincolns-Inn must no longer repair to their respective Chapels, but to their Parish-Churches, otherwise they may be compelled to it by Ecclesiastical Censures. He doubted whether Parishioners are compellable by the Ecclesiastical Laws, to repair to their Parish-Churches on Sundays; but agreed, that it was not commendable for a Parishioner to absent himself humorously from his Parish. At another Day, the Chief Justice held, that if a Man repaired to any other Chapel, it would be a good Excuse for his not coming to his Parish-Church; but then he must plead it: He also said, that if the Plaintiff in this Prohibition,

(4.)  
3 Salk. 585.  
Mod. Cases  
188, 189

Linw. 3. 143.

184.

1 And. 138.

2 Cro. 480.

1 Lev. 2. 167.

2 Roll. Rep.  
455.  
Hard. 406,  
407.



was a professed Churchman, and his Conscience would permit him sometimes to go to the Meetings of Dissenters; that the Act of Toleration would not excuse him for not coming to Church, for that Act was not made to give Ease to such People. At last a Rule was made for a Prohibition.

Powel J. The Reason why Parishioners ought to go to their Parish-Churches, is not for the Parson's Benefit; but because he having charged himself with the Cure of their Souls, he may be enabled to take Care of that Charge.

See Fees.

## C L A I M.

Anonymus. Hill. 5 W. & M.

(1.)  
Skins. 412.

**A** Nisi prius in Middlesex, a Fine and five Pears being given in Evidence upon an Ejectment in Bar of the Title of the Lessor of the Plaintiff, the Plaintiff shewed that at the Time of the Fine levied he was an Infant, and that within thre Pears he came to the Lands in Question, and at the Gate of the House said to the Tenant, that he was Heir of the House and Land, and forbad him to pay more Rent to the Defendant; upon which it was demanded, if he entred into the House when he made the Demand; it was said no. Upon which it was said, that the Claim at the Gate was not sufficient, which was agreed; but then it was proved, that he entered the House when he made the Claim, which being eo instante, it was well enough.

Per Holt C. J. Tho' the Claim was but at the Gate; but after it appeared that there was a Court before the House, so that tho' the Claim was at the Gate, yet it was upon the Land, and not in the Street; and therefore it was ruled to be good without Question.

Leonard *versus* Stacy. Pasch. 3 Ann.

**T**RESPASS for entering the Plaintiff's House, and taking away his Goods; Defendant justifies by Virtue of a Replevin, out of the Sheriffs Court in London, and a Precept thereupon to J. S. an Officer, and Defendant came in Aid of him. Plaintiff replies, That before the Taking away the Goods, he claimed Property in them, and gave Notice thereof to the Defendant; and the Question upon a Special Verdict was, Whether the Taking away, after Claim of Property and Notice thereof, did not make him a Trespasser ab initio? Held per tot. Cur', That he was a Trespasser ab initio, for tho' the Claim ought to be to the Sheriff or Officer, and a Claim to a Person that comes to Assistance, is not enough to the making the Execution illegal, if the Officer does not desist; yet if the Claim be notified to him that comes in Aid, he at his Peril ought to desist.

Jud' pro Quer' per tot' Cur'.

(2.)  
6 Mod. 139.

## COLLEGES.

Parkinson's Case. Mich. 1. W. & M.

**I**T was moved for a Mandamus for him to be restored to a Fellowship of a College in Cambridge, who was actually possessed of a Freehold therein, but was expelled.

1 Show. 74.  
Carthew 92.  
3 Mod. 265.

Per Cur' denied, because there was a Visitor there: And Holt C. J. said, that every College hath a Visitor, either by Appointment of the Founder or the Law; if it be a Lay one, the Founder or his Heirs; and if an Ecclesiastical one, the Bishop of the Diocese is the Visitor, and from whose Sentence there is no Appeal to this Court, especially in the Case of a Fellowship of a College, which is a Thing not at all concerning the Publick. A Fellow or Member of any College of Scholars or Physick, are on private Foundations, and governed by particular Laws of the Founders; for which Reason, this Court cannot take Notice

1 Lev. 65.  
2 Lev. 14.  
Raym. 56,  
100.  
Sid. 94, 152,  
346.

tice of their private Ordinances: Besides every Fellow of a College, when he is admitted to a Fellowship, accepts it under such a Condition, that he shall submit to the Government of the Visitor of that College; and if any Injury is done to him by an inferior Officer, his Remedy is by Way of Appeal to the Visitor.

By Holt C. J. The Colleges in the Universities are Lay Corporations.

4 Mod. 241.

In the Case of St. John's College. The Visitor is made by the Founder, and the proper Judge of the private Laws of the College; he is to determine Offences against those Laws: But where the Law of the Land is disobeyed, this Court will take Notice thereof, notwithstanding the Visitor; and then the proper Way to put it in Execution is by the Writ of Mandamus.

## C O M M I T M E N T.

The King *versus* Kendal and Rowe. Mich. 7 W. 3.

( 1. )  
Skin. 596,  
598.

**U**PON a Return to a Writ of Habeas Corpus, it appeared that the Defendants were committed by the Secretary of State and a privy Counsellor; and the Cause expressed in the Warrant of Commitment, was for High Treason, for being aiding and assisting to Sir James Montgomery, who was charged with High Treason and in the Custody of a Messenger, to make his Escape.

Dyer 296.

To this Return several Exceptions were made; to the Authority of the Secretary of State in making Commitments, &c. and for that the Cause was not sufficiently expressed, for the Prisoners were committed for being assisting to the Escape of Sir James Montgomery charged with High Treason, without shewing for what Treason Sir James was charged: And it was said, that there are some Treasons, for the receiving or abetting Persons guilty of which, it is not Treason, &c.

Holt C. J. The Commitment by the Secretary is good: But the Warrant of Commitment is not certain enough; it does not express for what Treason

Sir



Sir James Montgomery was charged, which is necessary; for the Defendants would be guilty of the same Species of Treason, as Sir James was: If he was guilty of levying War, the Defendants would be also guilty of this kind of Treason, and so of the other kinds; and for this Reason the whole Court agreed, that they should be bailed. As to the Exception; that the Commitment of Sir James to the Custody of a Messenger was unlawful; and that it ought to have been to the County Gaol, according to the Statute 5 Hen. 4. and therefore his Imprisonment being unlawful, his Escape out of such unlawful Custody, was not High Treason:

Holt C. J. doubted it in this Case; for though he did not approve of these Commitments, unless for a short Time, in order to the Offender's being examined, before he is committed to Gaol, which is for the Benefit of the Prisoner, as there may be Reason not to commit him; yet he said, that such Commitment to a Messenger, although it be irregular, it is not void, therefore the Escape would be Treason. 1 And. 297.

### The King *versus* Bethel. Pasch. 7 W. 3.

Holt C. J. **I**F Justices of the Peace commit Felons, it is to the Keeper of the Prison; but where the Court commits, 'tis to the Sheriff, who is their Officer, to whom the Court must award a Capias, and not to the Keeper. It does not appear that Bethel was in Execution, for a Commitment to the Gaoler is not any Commitment in Execution; it must be to the Sheriff, the Gaoler being but an under Officer; and it makes no Difference, that this Commitment was in Court, being there in Lieu of Process: We in this Court cannot commit to the Gaoler, but to the Sheriff; for though we have a Marshal, and a Prison of our own, yet we may commit to the Sheriff, and we have often committed to the Gate-house. 'Tis true, the Gaoler must take Notice of a Commitment to him, on the Return of a Habeas Corpus; but it is no otherwise good than as he is Servant to the Sheriff: And the Law takes Notice of a Gaoler, as one that has the actual Custody of the Gaol; so that it is criminal in him to suffer a voluntary Escape. The Prisoner was remanded, and put to his Writ of Error. (2.)  
5 Mod. 21,  
25.  
1 Sid. 144.  
1 Keb. 508.  
1 Salk. 348.

## COMMONS.

Bird *versus* Stroud. Trin. 8 W. 3.( 1. )  
3 Salk. 12.

**I**N Action on the Case, the Plaintiff declared, that he being possessed of a Tenement to which he had, and ought to have Common of Pasture in a certain Place, the Defendant had digged Coney-Boroughs there, per quod, &c.

To this Declaration there was a Demurrer, upon which the Plaintiff had Judgment in C. B. and on a Writ of Error in this Court that Judgment was affirmed: The Objection was, that the Plaintiff had not shewed any Title to this Common by Grant or Prescription.

2 Cro. 43.  
122.  
1 Vent. 356.

Holt C. J. The Action is grounded upon the Possession, and by what appears the Defendant is a meer Stranger; besides the Title is not traversable, but to be given in Evidence upon the Trial of the Issue, therefore it need not be shewn; and so it was adjudged.

Crowther *versus* Oldfield. Pasch. 2 & 4 Ann.( 2. )  
1 Lutw. 46.  
Mod. Caf. 19.

**C**ASE for disturbing the Plaintiff in enjoying Common, appurtenant to his Messuage, setting forth, That he was seised of a House, and ten Acres of Land, &c. Parcel of the Manor of W. which he held by Copy of Court-Roll in Fee, according to the Custom of the said Manor; but did not say Ad voluntatem Domini; and that he, and all the Tenants of the said Manor, had Time out of Mind Common on the Wastes of the same Manor, for all Beasts levant and couchant upon their Copyholds; and he was disturbed by the Defendant.

Upon Not guilty pleaded, the Plaintiff had a Verdict; but because those Words were left out of the Declaration, and it did not appear but the Plaintiff might have a Fee-simple at Common Law, and then he should have prescribed in his own Name; whereas he had prescribed, that he, as Tenant, and all other Tenants of that Manor, had Right of Common there: Altho' this was after a Verdict, which had found the Custom of the Manor, and that the Lands were

were Parcel thereof, yet the Judgment was arrested, in C. B.

A Writ of Error being hereupon brought in this Court, it was agreed, that a Man cannot be a Copyholder, nor an Estate be a Copyhold Estate, tho' it be held per Copiam Rotulorum secund' consuetudinem Manerii, unless it be also ad voluntatem Domini. But it was argued, that the Plaintiff had the Possession, and that is sufficient against the Defendant, who is a Stranger, and a Wrong-doer: Which is very true, but if he will set forth a Title, as he had done in this Case, and that Title is inconsistent in itself, a Verdict will not help it; now here he could have no Title as a Copyholder, because it doth not appear that he held ad voluntatem Domini, and he could have none as a Freeholder, because he had prescribed in the Manor; so that his Title being absurd and inconsistent, the Declaration must be ill; and for that Reason it is here said, the Judgment in C. B. was now affirmed in this Court.

Holt C. J. A Copyholder hath Right of Common, either as belonging to his Estate, or to his Land. Where it belongs to his Estate, and as such he claims Common in the Lord's Waste there, if the Copyhold is enfranchised, the Common is lost and extinguished, after the Estate is gone. The other Common as belonging to his Land, viz. where a Copyholder hath Common in the Wastes of another Manor; in that Case the Common is not lost by an Infranchisement of the Copyhold, because though the Estate is gone, the Land still continues. And the Chief Justice thought, that as the Pleadings were here, the Common might be said to belong to the Copyhold Tenement, since it belonged to the Copyhold Estate; for that which belongs to the Estate belongs to the Tenement. And the Court held, that now after Verdict this Estate of the Plaintiff must be taken to be a Copyhold Estate, because it is both laid and found, that the Tenements were Parcel of the Manor; and that by Custom, the Plaintiff, as a Customary Tenant has Common; all which is impossible, unless the Tenement was Copyhold; and therefore must be supposed such, though the Words ad voluntatem Domini were omitted.

Here it is said the Judgment was reversed, after great Deliberation.

3 Salk. 114.

1 Cro. 418.  
2 Cro. 315.  
2 Saund. 136.  
1 Mod. 294.

1 Salk. 365, 366.

Cro. Jac. 185, 499.  
Cro. Car. 295, 312.  
1 Jon. 319.



# CONDITION.

Atkinson *versus* Morrice. Pasch. 13 W. 3.

(1.)  
Cases W. 3.  
503.

**I**N Case, before Holt C. J. at Guildhall. M. agrees to give A. so much for the Use of a Coach and Horses for a Year, and A. agreed further with M. to keep the Coach in Repair. It was averred, the Coach and Horses were delivered to M. but nothing of the Repair.

And Holt C. J. held upon this Evidence, that Repairing was not a Condition precedent, and therefore need not be averred: But if the Agreement had been, that A. had agreed to give M. a Coach and Horses for a Year, and to repair the Coach, and that for that M. promised so much Money, then the Repairing had been a Condition precedent necessary to be averred. And tho' in this Case it was not expressly averred, that M. had the Use of the Coach for a Year; yet it being said it was delivered to him, it shall be so intended, if the contrary be not shewn on the Defendant's Side.

And Judgment pro Quer. above.

Pullerton *versus* Agnew. Trin. 2 Ann.

(2.)  
Salk. 172.

**S**Cire facias against Bail, reciting a Recognizance taken in the Time of King William 3. wherein the Condition was, that the Defendant should render his Body Prisonæ Mar. Mar. Dom. Reginae nunc; it was urged that the Condition was impossible, and in Consequence the Recognizance single.

Et per Holt C. J. Where the Condition is under-written or indorsed, there that only is void, and the Obligation single: But where the Obligation is Part of the Lien it self, if the Condition be impossible, the Obligation is void.

Co. Lit. 206.  
1 Leon. 189.

# CONFESSIO.

Jones *versus* Bodingham. Trin. 8 W. 3.

**I**N Trespas for taking in A. Defendant justified a Taking in B. by Process with an impossible Teste, *virtute cujus*, &c. and traversed the Taking in A. Issue was joined, and found for the Plaintiff, and Damages assessed. This Issue was held immaterial; for it is all one where the Defendant took them, since without Warrant, the Process being void; it was moved then for a Repleader.

Et per Holt C. J. It cannot be where there is a Trespas confessed. The Verdict was set aside, and a Writ of Inquiry awarded; because the Issue being immaterial, the Jury had no Power to enquire of Damages. The Plaintiff had Judgment on the Confession, and not upon the Verdict. Vide Mo. 696. Yelv. 89. 1 Cro. 25, 214. Hob. 327. 2 Ro. 99. 3 Cro. 722, 778, 227, 214, 445. 2 Cro. 678. 1 Saund. 128. Ray. 458.

( 1. )  
1 Salk. 175.

Cro. Eliz.  
318.  
Mod. Cases  
2, 3.  
3 Cro. 52.  
1 Leon. 78.  
1 Lev. 32.  
2 Lev. 135.

Hill. 9 W. 3. *At Nisi Prius at Guildhall, coram Holt Chief Justice.*

**I**Ndebitatus Assumpsit *versus* A. and B. and Judgment *versus* A. by Default; B. pleaded Payment; and Issue thereupon.

Et per Holt C. J. No Finding upon this Issue can discharge A. for he has confessed the Whole.

Slide Bargain and Sale, and Bonds.

( 2. )  
1 Salk. 23.  
1 Saund. 230.  
Cro. El. 701.

## CONSPIRACY.

Savill *versus* Roberts. Mich. 10 W. 3.

(1.)  
 Carthw  
 416.  
 5 Mod. 394.

**O**N a Writ of Error of a Judgment in C. B. in an Action on the Case in Nature of a Conspiracy, brought by Roberts against Savil and others, for maliciously causing him the said Roberts to be indicted, with other Persons, of a Riot, of which he had been duly acquitted. The Plaintiff in the Action had a Verdict; and upon Motion in the Court of Common Pleas in Arrest of Judgment, whether this Action would lie or not, it was held that it would.

3 E. 3. 19.  
 7 H. 4. 31.  
 Yelv. 46.  
 2 Cro. 42.  
 1 Saund.  
 128.  
 Raym. 180.  
 F. N. B. 106.  
 1 Lev. 275,  
 292.  
 2 Keb. 473,  
 476, 497.  
 Style 379,  
 451.

After several Debates in this Court, the Judgment was affirmed.

And Holt C. J. said, Because the Plaintiff hath suffered Damage in his Property, this Action will lie. For no Man who is indicted can be discharged or acquitted; without considerable Expences laid out to defend himself, and therefore the Action is maintainable for the Reparation of that Loss. There is a Difference between Action on the Case, which is in nature of a Conspiracy, and a Writ of Conspiracy at Common Law; for in this Case the Damage sustained is the Ground of the Action, but in the other it is founded merely on the Conspiracy. And if the Defendants are convicted; a villainous Judgment is given against them; therefore the Writ of Conspiracy doth not properly lie in any Case, but where it was to indict the Person of Treason or Felony, by which his Life was put in Danger; and all other Cases of Conspiracy mentioned in the Books, were but Actions on the Case. Now here the Jury having found that Roberts was indicted maliciously, and without Cause; tho' the Indictment was but for a Trespass, yet 'tis reasonable the Plaintiff should have Judgment for the Loss which the Jurors find he hath sustained by the malicious Prosecution, made by the Defendant in the principal Action. Tho' withal the Chief Justice expressly declared, that these kind of Actions ought not to be encouraged; and that the Judge before whom any of them are tried, should hold the Plaintiff to a Proof of express Malice in the Defendant, in the Prosecution by way of Indictment; for otherwise the Plaintiff must be nonsuit.



*Muriel versus Tracy, Jenkins and others.* Pasch.  
3 Ann.

IT was an Action of the Case in Nature of a Conspiracy, (2.) wherein the Plaintiff declared, that the Defendants, by Mod. Caf 169, 170. Conspiracy between them had to vex and oppress him, did, by Pretence of a Warrant from a certain Justice of Peace, arrest him the Plaintiff, and carry him before the said Justice, who at the Persuasion of Tracy refused to bail him, tho' good Bail was tendered; on which he was committed to Prison, where such Sums of Money were extorted from him; and it was not said in the Declaration that it was without probable Cause.

Holt C. J. The Circumstances of the Evidence shew it to be all one Chain of Malice; and if the Declaration were good, the Evidence would maintain it: But the Declaration is ill, for not alledging it to have been done without probable Cause; and there can be no Conspiracy in taking up one by a legal Warrant, especially it not being so laid; therefore he willed them to withdraw a Juroꝝ. This being in Nature of a Conspiracy, the Chief Justice said, All might be acquitted to one, and he found Guilty. 1 Vent. 86.

*The Queen versus Best & al.* Trin. 3 Ann.

THE Defendants were indicted, for that they being (3.) scandalous and wicked Persons, in order to oppress Mod. Caf. 185. and defame one P. P. and to get to themselves unlawful 1 Salk. 174. Gains of Money from him, they did falsely, wickedly and maliciously conspire, contrive and agree among themselves, falsely to charge the said P. with being the Father of a Bastard Child, with whom they pretended a certain Woman to be then big; and that in pursuance thereof, they did falsely affirm him to be the Father. There was a Demurrer to this Indictment, and several Exceptions were taken to it; for not averring that P. was not the Father of the said Child, and that he was innocent, &c.

Holt C. J. A Conspiracy to charge falsely is indictable, but the Party ought to shew himself to be innocent; for People may lawfully meet, and contrive and agree to charge a guilty Person; and to say that they met and agreed to charge falsely, I think will not be enough, without shewing the

2 Cro. 131, 8.  
Hob. 219.

the Foundation of the Falsity, viz. the Party's Innocency. And here, if the Defendants had pleaded Not Guilty, they must have been acquitted. Indeed this is not an Indictment for a formed Conspiracy, which requires an infamous Judgment, and Loss of *Liberam Legem*, as upon Conviction on Attaint, and for which an Indictment will not lie 'till Acquittal, or Ignoramus found. But this seems to be a Conspiracy or Confederacy to charge one falsely, which sure is a Crime; and it is a Crime for several Persons to join and agree together to prosecute a Man Right or Wrong: If in an Indictment for such Confederacy you proceed further, and shew a legal Prosecution thereof, there you must shew the Event, as Acquittal, &c. but where you rest upon the Confederacy, it will be well without more.

Per Cur. This is a Conspiracy to charge one falsely with Fornication, which tho' it be no Crime at Common Law, yet is punishable in the Spiritual Court; and a Confederacy to charge with a Thing that is a Crime by any Law, is indictable.

Judgment thereon for the Queen.

## CONSTABLES.

The King *versus* Bernard. Mich. 8 W. 3.

(1.)  
2 Salk. 502.

**O**N an Indictment, setting forth that Bernard was chosen Constable in a Corporation, according to the Custom there, in due manner, and he refused to take upon him the Office; to which Indictment there was a Demurrer.

5 Mod. 127.  
1 Mod. 13.  
1 Roll. Abr.  
535, 541.  
1 Bulst. 174.

Holt C. J. At Common Law all Constables were chosen at the Leet, and where there was no Leet, at the Turn; but whether by the Steward or the Homage Jury, has been a great Question. Put without Question, a Corporation of common Right cannot chuse a Constable. 'Tis true, by Custom they may do it, as having the Government of the Place reposed in them; but then they must prescribe for this Liberty.

Case of the Village of *Chorley*. Trin. 11 W. 3.

**T**HIS Village having no Constable, by an Order of Sessions the Justices of Peace appointed one to serve there: Their Authority wherein was contested. (2.)  
1 Salk. 176.

By Holt C. J. A Village and a Constable are Correlatives, but a Hamlet has no Constable. And tho' a Constable may be chosen in the Tourn or Leet, the Justices of Peace have all along exercised a Power of appointing Constables, and we will intend that they have a sufficient Authority for it; but the Statute 13 & 14 Car. 2. c. 12. gives them Power to do it only in the particular Cases therein mentioned. And as to the Authority of a Constable out of his Parish he said, If a Warrant be directed to the Constable by Name, commanding him to execute it, altho' he is not compellable to go out of his own Precinct, yet he may if he will, and shall be justified for so doing: 'Tis otherwise if the Warrant be directed generally to all Constables, &c. here no Constable can execute the same out of his Precinct, for it shall be taken respectively. 2 Jon. 212.

Per Holt C. J. No Man that keeps a Publick House ought to be a Constable. Mod. Caf. 42.

## C O N T E M P T.

*Toler's Case*. Pasch. 12 W. 3.

**A.** An Infant sued a Writ of Appeal against B. as Heir to C. for the Murder of C. and D. was admitted as Prochein amy to A. after the Writ was sued out, and before it was returnable, at the Day of the Return, the Court was moved that the Sheriff might return his Writ. The Under-Sheriff in his Excuse shewed, That the Infant, with some of his Relations, came and required him to deliver the Writ to them, and that he deliver'd it accordingly. It was insisted, that it was usual for them to deliver Writs back to the Party when desired; and tho' the Plaintiff was an Infant, yet he might (1.)  
1 Salk. 176, 177.



might recal the Writ, for he may disavow his Guardian. 2 Bulst. 59. And may disavow his Suit. 1 Roll. 288.

Holt C. J. contra, The Suit is subject only to the Direction of the Guardian, and so is the Writ. The Infant can no more dispose of the Writ than he can prosecute it; and he has no more Power over it out of Court than in Court. The Under-Sheriff has delivered the Writ without Authority, and this is a Contempt. Et per omnes Justic' præter Turton, The Under-Sheriff was fined and committed, notwithstanding his Clerk in Court offered to undertake for the Fine.

Kingsdale *versus* Mann. Mich. 2 Ann.

(2.)  
6 Mod. 27.  
S. C. 1 Salk.  
321.

6 Mod. 115.

6 Mod. 115.  
298.

IT appear'd by Affidavits, that Possession was delivered by Hab. fac. Posses. at nine o'Clock in the Morning, and at Six o'Clock at Night the Plaintiff was forcibly turn'd out of Possession: The Court held, That upon an Habere fac. Posses. it is not a compleat Execution, till the Sheriff or his Bailiffs deliver the Possession to the Party, and are gone away. If immediately after such Execution, the Defendant turns him out of Possession, it would be a Disturbance of the Execution, for which an Attachment ought to go. But here they doubted, Whether after so many Hours it could be look'd upon as a Disturbance of Execution; therefore the Rule was to shew Cause why an Attachment should not go. Powell cited a Case in the Common Pleas, where upon an Entry upon the Plaintiff the same Day he had Execution, the Court granted a new Habere fac. Posses.

To which C. J. Holt answered, so they might, if the first Execution were not returned, otherwise not. Quod Curia concessit.

## Continuance and Discontinu- ance.

Stephenson *versus* Etherick. Mich. 1 W. & M.

**J**UDGMENT upon a Demurrer, and a Writ of Inquiry (1.)  
was executed and returned; the Plaintiff, thinking  
he had too little Damage given, moved that he  
might discontinue; and 1 Cro. Earl of Oxford's Case  
and Leon. were cited, that he might discontinue; for the  
Judgment upon Demurrer, is but the Award of the Court,  
and but interlocutory. Com. 170.  
171.  
1 Show. 63.

Holt C. J. It is discontinuable by Consent, but not  
without. 1 Roll. Cit. Discontinuance. That 'tis not dis-  
continuable by the Court after Verdict, without the Defen-  
dant's Consent, which doth not differ from this Case; and  
'twas said, if the Plaintiff should on Purpose omit the  
Continuances, the Defendant may enter then without his  
Consent, and the Defendant may bring in the Writ of  
Inquiry, if the Plaintiff do not.

Dolben and Eyres J. The Plaintiff in this Case cannot  
discontinue, and there is no Difference between this Case  
and that of a Discontinuance after Verdict: And Dolben  
said, he had two or three Cases to the same Purpose, and  
it would be veratious and mischievous to discontinue in  
such a Case.

Wallwin *versus* Smith. Trin. 3 W. & M. Rot. 361.

**D**EBT upon a Bond in the Corporation Court of  
Hereford, conditioned to perform, &c. the Defen- (2.)  
dant pleaded Performance. The Plaintiff replied, and as-  
signed a Breach, Issue was joined and an Entry made,  
that the Mayor was removed, and another chosen; but no  
Day was given to the Parties, nor any Court held; a  
Venire afterwards was awarded, and the Issue tried. Upon  
Error brought in B. R. it was objected, that the Statute  
32 H. 8. c. 30. did not extend to inferior Courts; and that  
it  
1 Salk. 177,  
178.  
Carth. 206  
Farrell. 5.  
4 Mod. 86.  
Show. 320.  
Stat. 32 H. 8.  
c. 20.  
Carier 57.  
contra  
2 Saund. 258.

## 156 Continuance and Discontinuance.

it help'd only Discontinuances of Pleas or Process, and not of the Court.

But per Holt C. J. It is a remedial Law, and extends to all Discontinuances, as well in inferior as superior Courts. Inferior Courts have most need of such Assistance.

St. John *and* Camphell. Pasch. 7 W. 3.

(3.)  
Com. 323.

SIR Barth. Shower moved to amend the Demurrer to the Demurrer.

Holt C. J. That were by amending the Record, to bring a Cause into Court which is now out of Court; for it is a Discontinuance. Then Sir Barth. Shower pray'd a Repleader.

Holt C. J. That cannot be after a Discontinuance. (Northy, 'Tis all upon Record).

Sir Barth. Shower: I hope we may discontinue without Costs.

Holt C. J. There is no Costs upon a Discontinuance in Law, otherwise where you discontinue by Leave of the Court.

Pasch. 12 W. 3.  
Cases W. 3.  
377.

Holt C. J. If a Writ of Execution be taken out within the Year, and the Sheriff make no Return to it, upon entering a Vicecomes non misit breve once a Year, you may continue it, and not be put to sue a Scire facias.

Turner *versus* Turner. Pasch. 2 Ann.

(4.)  
1 Salk. 179.

DEBT upon a Bond, the Defendant pleaded a Composition; upon Demurrer the Court gave a Rule for Judgment Nisi causa, and being stirred again the former Rule was made absolute. The next Day Mr. Mountague moved to discontinue, alledging that this was a sham Plea, and no such Composition ever made, and cited 1 Saund. 39. 23. 2 Saund. 73.

1 Lev. 192.  
43. 298.

But per Holt C. J. After a Rule nisi, and then a peremptory Rule for Judgment, it was never done.



## CONVICTIONS.

The Queen *versus* Bothel. Mich. 2 Ann.

**T**HE Defendant was convicted upon an Indictment before Justices of Peace, for beating certain Officers, and not being present, no Judgment could be given in it, but a Capias pro fine awarded; then he by Certiorari removed up the Conviction, to which Objections were made, and the Attorney General moved for a Procedendo.

Holt C. J. To remove Convictions the Writ of Certiorari goes every Day, of which Writ of Error doth not lie, for that is the Party's only Remedy; but Certioraries have also gone where Writ of Error would have lain, for removing a Conviction, as to plead a Pardon, or for other Special Reason: And he remembered a Case in Chief Justice Scrogg's Time, where a Certiorari was sent out of this Court to remove a Conviction upon an Indictment before Judges of Assize, and that the Court gave Judgment; it was for Words, and there a Writ of Error will lie: And wherever a Conviction is upon an Indictment, Writ of Error lies thereof; and he said the Course of the Crown-Office was to remove Judgments of Attainder, &c. by Certiorari. But here being no Special Reason in this Case, let Procedendo go.

(1.)  
4 Mod. Caf.  
17.

1 Vent. 33.  
1 Sid. 419.  
1 Cro. 514.  
377.

The Queen *versus* Dyer. Mich. 2 Ann.

**I**N this Case Dyer was convicted on the Statute of 7 Jac. I. c. 7. for imbezilling Parn delivered to him to be woven; and the Conviction sets forth the Complaint, and the Charge, and that he was summon'd such a Day; but that was impossible, there being no such Day, &c.

Holt C. J. The Party ought to be summoned of common Right, and it would be well to shew that he was summon'd and appear'd, or did not appear, or could not be found to be summoned; and where an Act of Parliament orders the Offender should be convicted, that must be intended after Summons, that he may have an Opportunity

(2.)  
Mod. Caf. 41.  
1 Salk. 181.

of making his Defence; and this Summary Jurisdiction ought to be held strictly to Form, wherein every Thing should appear regular; also the Justices ought to make a Memorandum, that such a Day Complaint had been made; that thereupon a Summons issued returnable such a Day; and that the Party did or would not appear, &c. and it is unlawful and abominable to condict a Man behind his Back unheard.

See Deer-stealers.

## Copyhold Estates.

King *versus* Dilliston. Hill. 1 W. & M.

(1.)  
1 Show. 83,  
87.

**E**RROR on a Judgment upon a Special Verdict in Ejectment, brought in this Court; the Point was, Whether J. F. an Infant be bound by the Custom of the Manor, so as to make a Seizure or Forfeiture of the Estate, for the Surrenderer's not coming in to take it up on a Surrender: The Court of Common Pleas adjudged it for the Defendant, and that an Infant cannot reasonably be presumed within the Custom.

Yelv. 145.  
1 Cro. 349.  
2 Cro. 368.  
1 Cro. 107.

Holt C. J. I am of a contrary Opinion to my Brothers, who are for Affirming the Judgment; and that which governs my Opinion is, that until the Heir of the Surrenderer be admitted, the Estate of the Copyhold remains in the Surrenderor, and then the Lord's Estate remaining in the Surrenderor, the Infancy of the Heir of the Surrenderer cannot affect this Case: The Surrenderer till Admittance hath neither a Right in or to the Thing, nor hath the Party any Remedy if the Lord refuse to admit; so that 'tis plain the Infant here is a meet Stranger to the Estate, and therefore it is unreasonable that his Infancy shall protect another Man's Estate. The Infant is at no Prejudice; for is it any more to the Infant's Loss or Disadvantage, whether the Lord or the Surrenderor have the Profits: the Forfeiture is committed by the Surrenderor, not by the Infant, i. e. in making the Estate to such a Man, who will not come in and take it up, and why should he en-

2

107

joy against the Lord? 'tis a Forfeiture, but defeasible; because it is a Condition annexed to the Estate, and this being the Custom of the Manor, 'tis the Law of the Place, and being Copyhold he must perform the Conditions required: This Custom that obliges the Infant, is to entitle the Lord to a Fine; and Infancy shall be extended to delay a Remedy, but never to endanger it: Now here a Fine is incident by the Common Law to all Copyholds, and suppose the Infant dies, the Lord can never have Consideration of his former Fine. The Reason why the Law takes Care of Infants is to preserve the Inheritance, and not the mean Profits; and here is no Loss to the Infant's Inheritance in this Case, nor any Benefit to him by the other Construction, but only to the Surrendero: Wherefore I am of Opinion, that the Judgment is ill. But because all my Brothers are of another Opinion, it must be affirmed.

See now Stat.  
9 Geo. 1. c. 29.

Glover *versus* Cope. Pasch. 3 W. & M.

**I**N this Case, the only Question was, Whether the Surrenderer of Copyhold Lands is a Person within the Statute 32 H. 8. c. 34. to enable him to maintain Action of Covenant against a Lessee; as a Grantee of a Reversion might at Common Law; or whether Copyhold Estates are within the Meaning of that Act, it being formerly held that they were not.

(2.)  
Carthew 205.  
1 Salk. 185.  
3 Lev. 326.  
Skinn. 305.

By Holt C. J. and the Court, The Grantee or Surrenderer of the Reversion of Copyhold Lands is within the Intention and the Equity of that Statute, to bring Debt or Covenant against the Lessee, for 'tis a remedial Law, and of great and universal Use; and absolutely necessary as well for Copyholders as others; and by this Construction of the Statute, no Prejudice can arise to the Lords of Copyhold Manors: And the only Reason why Copyhold Lands have been adjudged not to be within the Meaning of other Statutes, is because of the Respect of the Lord's Damage.

Judgment for the Plaintiff.

Benson



Benson *versus* Scot. Intr. 5 & 6 W. & M.  
Rot. 566.

(3.)  
3 Lev. 385.

**E**JECTMENT of Lands in Wethersfield in Essex, and on Not guilty, and Special Verdict found, the Case was this: Samuel Scot, (seised in Fee of Lands in Question, being a Copyhold, where the Custom is, that the Wife shall have Free Bench of all Copyholds whereof the Husband died seised) takes the Defendant to Wife, and afterwards, Octob. 3. 1690. surrenders to Barbara Scot and her Heirs, conditioned to be void upon Payment of 70 l. the 20th of August next following, and at a Court held 1 June 1691. this Surrender was presented, to be enrolled; but before Admittance the Surrenderer dies, and after his Death the Surrenderee is admitted: And the Question was, If in this Case the Wife should have her Free Bench? And 'twas said for the Defendant, that 'till Admittance the Copyhold remains in the Surrenderer. 1 Cro. Burgoin against Spurling, 3 Cro. 422. Yelv. 16. And then the Husband died seised, and consequently the Wife is within the Custom; and though by the Admittance after, the Surrenderee is in from the Time of the Surrender; yet 'twas said for the Defendant, that that was only a Relation and Fiction of the Law between the Parties, and to prevent or make void all mean Acts of the Surrenderer, but not to prejudice the Wife, who is a third Person, as Co. 3 Rep. Butler and Baker's Case. 2. That altho' the Title of the Surrenderee is to be computed from the Time of the Surrender, so is the Title of the Wife to be computed from the Time of the Marriage; for then was her Title incepted, tho' perfected by her Husband's Death. So the Title of the Surrenderee is no more than an incepted Title by the Surrender, and only perfected by the Admittance. So that the Wife here had an incepted Title before the Inception of the Title of the Surrenderee, which was also perfected before the Perfection of the Title of the Surrenderee, which was not till after the Husband's Death; whereas the Wife's Title was perfected by the Husband's Death. But Holt C. J. and the whole Court held the contrary, and they denied that the Wife had any incepted Title by the Marriage in this Case, as Wives have to their Dower at the Common Law, but that she had only a conditional Inception of a Title subject to the

Power of the Husband, of avoiding it by Alienation, which Power the Husband had not at Common Law, for he could not by Alienation defeat the Wife of her Dower; but without Doubt the Husband might here have precluded the Wife from her Free Bench by Alienation; for he is not to have it except the Husband died seised, which he did not in this Case, by Reason of the Surrender, and they relied much on the Case in Co. Lit. 59. b. A Copyholder Jointenant surrenders, and dies before Admittance, the Survivor shall be precluded by the Admittance afterwards. And Judgment was given for the Plaintiff. Levinz for the Defendant. Webb of the Inner Temple for the Plaintiff.

Page *versus* Smith. 8 W. 3.

According to **W**hatsoever Land may pass by Deed without Surrender, or by Surrender according to the Custom of the Manor, without saying Ad voluntatem Domini, is no Copyhold: But on a Covenant to surrender Copyhold Lands to another, the Covenantor surrendered to two Copyholders out of Court, to his Use; this was a good Performance of the Covenant, for 'tis a good Surrender. A Lord pro tempore having Title, by admitting a Copyholder who hath forfeited his Estate, dispenses with the Forfeiture; and that not only as to himself, but also to him in Reversion, here his Grant and Admittance amounts to an Entry for the Forfeiture and a new Grant: And a Forfeiture of a Copyhold is a Determination of the Will of the Party; and therefore the Lord may grant it without Seizure, he being in as of his Reversion.

(4.)  
3 Salk. 100.

2 Lintw. 1171.  
Hard. 293.  
1 Lev. 26.

Head *versus* Tyler.

Holt C. J. **I**f there be a Copyhold Estate for Life, Remainder to B. if Tenant for Life forfeit, it is not such a Determination as to let in the Remainder; but the Lord shall enjoy it during the Life of Tenant for Life.

(5.)  
Cases W. 3.  
123.  
1 Saund. 151.  
9 Co. 107 a.

Cases W. 3.  
138.

Holt C. J. If a Tenancy escheat to the Lord it becomes Part of the Manor; but if the Lord purchase Part, it is only holden of the Manor, and not Part of it; but the Rent and Services are Part.

Ashmond *versus* Ranger. Pasch. 12 W. 3.

( 6. )  
Cases W. 3.  
378, 379.

**L**essee for Years of a Copyholder's Widow, holding in of her Widow's Estate according to the Custom, brings Trespass against the Lord, for cutting and carrying away several Timber-Trees upon the Copyhold Land; several Questions were moved: 1st, Whether the Lord could enter upon the Copyholder, and cut Trees for his own Use. 2dly, If he could not, what Remedy the Tenant had, whether Trespass or Case, or both. 3dly, Whether in Case the Lord cannot cut, whether the Tenant may, or if the Tenant cannot justify Cutting, whether by Cutting he forfeits his Estate. And it was said at the Bar, that a Copyholder might cut for necessary Repairs and Estovers, and not otherwise; therefore the Lord may cut them, or else it would follow, that here would be a noble Wood, and no Body have Right to cut it; and so it would be useless to the Publick, and never to be cut in Case of Copyholder in Fee.

Holt C. J. This being by Lessee for Years, will not alter the Case, because he is Lessee of a Copyholder, and nemo Potest plus juris in al' transferre quam ipse habet. But as to the main Point, if the Lord cut down so many Trees, as not to leave sufficient Estovers, &c. the Copyholder shall have Trespass, and the Value of the Trees in Damages; but if he leave sufficient Estovers, then he shall have Trespass too, but shall only recover special Damages, viz. for the Loss of his Ambage, &c. breaking his Close, treading his Grass, &c. And the Tenant has the same customary or possessory Interest in the Trees that he has in the Land; and if the Lord has a Bind to cut Trees, his Business is to compound with the Tenant. 3 Cro. 361. That Tenant may lop under Boughs, and cut for Repair and Vote; and 3 Cro. 5. is not Law, as appears by Heiden and Smith's Case. 13 Co. If Birds build Nests in the Trees, the Eggs are the Tenants, which shew that he has the possessory Interest in the Trees, tho' his Estate be but for Years. And whether the Lord may cut Trees leaving sufficient Estovers, is very gently trod on in Heiden and

Smith's



Smith's Case; but no Copyholder can commit Waste without a Special Custom, but all Copyholders have Estovers of common Right. If a Man grants all his Estovers, and cuts down the Wood, or does any other Act whereby the Grantee loses the Benefit of the Grant, Case will lie. And so Yelv. and Goldsborough. Et Jud. pro Quer.

Fisher *versus* Nicholls. Hill. 12 W. 3.

Holt C. J. **H**eld in this Case, That Copyhold Estates are subject to the Rules of Law, and will not pass by such Words in a Conveyance as are improper to pass other Estates, unless there be a Custom for it, which may and often doth distinguish them; as in some Manors a Grant to A. B. C. D. and E. F. shall be construed a Gift to A. B. for Life, Remainder to C. D. for Life, and Remainder to E. F. for Life, by the Custom of those Manors. (7.) 3 Salk. 99.

Smartle *versus* Penhallow. Trin. & Mich. 2 Ann.

**T**he Case was this on a Special Verdict; the Custom of a Manor in Cornwall was found to be, That every customary Copyhold of that Manor might be granted to three Persons, to hold to them successively, sicut nominantur; and that on the Death of every Tenant, the Lord should have his best Beast for a Year: And a Surrender is found to have been to T. N. and his Assigns, for his own Life, and the Lives of two others. Here the Question was, If this Surrender were warranted by the Custom, for the Whole, that is for the three Lives; or if it were not good for three Lives, whether it be good for his own Life? (8.) Mod. Cases 63, 66.

Holt C. J. Where the Custom is to grant a Copyhold Estate for three Lives, the Lord in Fee of the Manor cannot exceed that, and a Lord at Will of it may go so far, for it is not material what Estate he hath therein; and surely he that may grant for three Lives, may grant for one Life; as if a Custom be, that the Lord may grant in Fee, yet he may do it in Tail, for Life, or Years; and here the three Lives is only the Extent of the Custom, but not to bind a Man to the strict Formality of an Estate for three Lives. The Manner of granting it by this Custom, is

4 Rep. 25,  
30.  
Cro. Eliz.  
323, 327.  
1 Roll. Abr.  
511.  
1 Leon. 56.  
1 Mod. 627.

is that it be to Three, that they shall not take jointly and in presenti, according to the Course of the Common Law; but that the first named shall take all for his Life, and the second all for his Life, and so of the Third: And if the Custom will enable him to let for three Lives, it will enable him to do it for one; also if the Custom be to grant for Life, the Lord may grant durante viduitate, tho' that be another Limitation than for Life. And generally where a Custom is to grant to three Persons for their Lives, Habend. successive sicut dominantur, there likewise the Custom is, that the Tenant in Possession may, by the Surrender of his Estate, defeat the Remainders. And then as to the Objections made in this Case, that the Berlots due to the Lord would be lost, if the Grant be construed good; that is not so, for the Lord would have a Berlot on the Death of every Tenant, and upon the Death of T. N. here, and he is the only Tenant; and tho' he has none on the Deaths of the Cestui que vies, it is because they are not Tenants.

It was here agreed, that if the Grant had been to A. for the Lives of B. C. and D. and A. dies, without making any Disposition of it, the Lord should have the Land again, against his own Limitation; for there can be no Occupant of a Copyhold Estate, without a Special Custom.

Uide Commons.

*Idle versus Coke.* Pasch. 4 Ann.

(9.)  
2 Salk. 620.

**H.** Seised in Fee of a Copyhold, surrendred the same to the Use of himself for Life, and after that to Valentine his Son, and Alice his Wife, pro & durante termino vitarum suarum naturalium & hered. & assignat. prædict. Valentini & Aliciæ; Et pro defectu talis exitus, To the Use of himself and his Heirs. It was held per totam Curiam,

2 Salk. 618.

1st, That a Limitation of Uses in a Copyhold Surrender must be construed by the same Rules, as if it were a Limitation in any other Conveyance at Common Law; and that the Intent of the Party is not sufficient, as in a Will.

2dly, In a Gift in Tail it must be limited of what Body the Issue is to come, so as it may appear by express Words or something tantamount, and therefore a Gift to H. and his Heirs Males, is not an Estate-tail, because it does not appear of whose Body they are to issue.

Brown *versus* Dyer. Trin. 5 Ann.

Estate and Special Verdict; the Case was, That A. being seised of Copyhold Lands in Fee to him and his Heirs in Borough English, had Issue two Sons by one Tenant, and two Sons by another Tenant, and being so seised, he the 4th Year of Car. 1. surrendered into the Hands of the Lord to the Use of himself and the Heirs Males of his Body, but no Admittance is found, and then he dies, the Wife having the Lands by Free Bench during her Widowhood; then the Jury find, that during the Life of the Wife, all the Children of A. died without Issue, except the eldest Son, then the Wife dies; moreover, they find, that after her Death the eldest Son is admitted in the Year 1653, and that some Time after he does mortgage the Lands in Question to the Plaintiff for One hundred Pounds, and the Mortgagor dies, and in 1688, the Defendant, his Son and Heir, was admitted; the Plaintiff not receiving his Money according to the Condition, brings an Ejectment; and the Question upon this Special Verdict was; First, Whether A. by the Surrender 4 Car. 1. was Tenant in Tail, or whether, there being no Admittance upon the Surrender, the Estate in him was changed; for if it were, then the Issue in Tail would avoid the Mortgage. 2dly, Admitting there was no Intail in the Case, yet being Lands in Borough English, Whether the Reversion after the Death of A. did not descend to his youngest Son by the second Tenant; and if so, the eldest Son, who was Mortgagor, could never by the Rules of Law make himself Heir to his Brother of the Half-Blood; or whether the youngest Sons by the second Tenant, all being dead in the Life-time of the Feme, who had a Free Bench, which was a Continuance of the Estate of her Baron, so that there could be no possessio fratris, Whether the Mortgagor, who was Heir at Law, and in Borough English to his Father, had not a Right to the Estate.

This Case was argued by King for the Plaintiff, and Cheshire for the Defendant.

But to the first Point the Court did unanimously resolve, that without Admittance on the Surrender he did continue seised in Fee as before, for the Lord could otherwise have no Remedy for his Fine, &c. according to 2 Cro. 403. El. 9.

(10.)

Of the Admittances of Copyholds. If a Copyholder dies leaving Children by several Venters, the Free Bench of the Woman shall serve it, so as that whosoever of the said Children is alive at her Death may inherit it, tho' it were of the Custom of Borough English.



As to the second Point the Court were divided, but they thought, that on the Authority of Clements and Scudamore's Case in this Court, Hill. 2. of this Queen, that the Heir of the youngest Son should have the Land; but they ordered this Point to be argued.

Brown *versus* Dyer. Hill. 5 Ann.

(11.) **T**HE Court gave this Day Judgment for the Plaintiff; and Holt delivered the Opinion of his Brethren, viz. That the eldest Son was in of the Fee-simple, for there was no Admittance upon the Surrender which was made 4 Car. 1. and therefore the Surrenderor did continue seised as he was before.

Powell said there could be no Admittance by Implication; to the second Point he said, that the Wife having this customary Freehold after the Death of her Children, and she dying, then the eldest Son should take as Heir to the Father, according to Estates at Common Law; and he said, that where the Custom is doubtful, 'tis the best Way to follow the Rules of the Common Law, as this Court did in the Case of Clements and Scudamore.

## C O R O N E R S.

The King *versus* Warrington. Mich. 3 W. & M.

(1.)  
1 Show. 329.

**I**T was here moved in Arrest of Judgment, that a Venire misawarded, for it ought to have been directed to the Coroners, on Exception to the Sheriffs of Chester, where one of them was a Party; and for that both the Sheriffs make but one Officer, and the one can do no Act of himself.

31 Aff. pl. 20.  
22 H. 6. 5.  
Brownl Decl.  
44.

Holt C. J. The Venire facias is well awarded; the Objection is, that the Sheriffs are but one Officer, and have the Sheriffsalty jointly in them; but 'tis otherwise in Case of a Challenge: The Coroner is only to execute the Writ, when there is no proper Officer; for if there be no Officer at all, as if the Sheriff die, the Coroner cannot execute

execute it. So that 'tis the Challenge to the Sheriff as improper, that makes the Coroner a proper Officer; and suppose one Coroner be challenged, the other may execute the Writ, tho' the Coroners are but such one Officer as the two Sheriffs are.

Judgment was given for the King.

Dominus Rex *versus* Strikely. Pasch. 13 W. 3.

A Person having killed himself, as was believed, feloniously, the Defendant being Coroner, having sworn the Jury to inquire, and finding the Evidence very strong, took off some of the Inquest. (2.) Cases W. 3. 493.

Holt C. J. It is not in a Judge's Power to take off a Jurymen after he has sworn. And tho' this Coroner be a weak silly Man, yet that is no Reason why there should not be an Information against him: For such Men must learn, they must not thrust themselves into Offices; and the Return of the Inquisition, finding the deceased Non Compos, not being filed, it was quashed per Cur'.

The Queen *versus* Clerk. Pasch. 1 Ann.

A Coroner's Inquisition finding that one Clerk as a Felo de se had killed himself, being removed into this Court, was quashed; for these Inquisitions must not be taken by Intendment any more than Indictments, because the Party is to forfeit his Goods and Chattels by their finding. This Inquisition being quashed, tho' the Body had lain buried seven Months, the Coroner took it up again, and had another Inquisition found; which was complained of as irregular, and moved to be set aside. (3.) 1 Salk. 377. Farrell. 16.

Holt C. J. said, The Coroner is not obliged to go ex officio to take the Inquest, but ought to be sent for, and that when the Body is fresh; and it is a Misdemeanor to bury the Body before, or without sending for the Coroner. 'Tis true, the Body may be dug up again, but it ought to be where freshly pursued, and not at such a Distance of Time; for it is a Ruseance, and may infect People: And in Barkley's Case, there was Leave of the Court for that Purpose. 2 Lev. 141. 1 Vent. 239. 278. 2 Hawk. 41.

At last it was agreed, that the Inquisition should be traversed, and tried at the Assizes.

Per

Farrell. 10.

Per Holt C. J. It is a Matter indiffable, to bury a Man that dies of a violent Death, before the Coroner's Inquest have sat upon him.

## CORPORATIONS.

(1.)  
3 Salk. 102.

By Holt C. J.

A

Corporation is an Ens civile, a Corpus Politicum, a Collegium, an Universitas, a jus habendi & agendi, &c. And some are consti-

tuted for publick Ends, and others for private Charities; the former are not subject to any Founder, or particular Statutes, but to the general Laws and Statutes of the Kingdom, by which they are maintained; but private Charities are subject to the Rules and Ordinances of the Founder.

The King *versus* The Mayor and City of London.  
Trin. & Mich. 3 W. & M.

(2.)  
1 Show. 263,  
280.

ON a Mandamus to restore Sir J. S. to the Office of an Alderman of London, to which he had been duly chosen and preferred, according to the Custom of the said City used and approved; which was so returned, and that he enjoyed the said Office till after the Act for abrogating the Oaths, &c. but for that he did not take the Oaths by the said Act prescribed, but to do the same did altogether neglect, thereby and by Virtue of that Act, the said Office became void.

Holt C. J. The Return agrees him duly elected Alderman according to the ancient Customs of the City, and that he continued so, and did not take the Oaths. An Alderman depends altogether upon the Being of the Corporation, for the Aldermen are a Part thereof; and whether by the Judgment against the City, as 'tis recited in the Act, we cannot construe this Corporation to be dissolved. I am of Opinion that a Corporation may be forfeited, if the Trust be broken, and the End for which it is instituted be perverted. Then, whether a Judgment to seize a Corporation doth dissolve it? To explain this, there are three Sorts of Liberties; a Liberty granted from the Crown, which doth sub-



first in the Crown; a Liberty created de novo, that exists notwithstanding it be forfeited; and another, which cannot exist but in the Persons to whom granted. In the first, Judgment to seize or oust is proper, for then it belongs to the Crown; if the other be forfeited, Judgment is for a Seizure and no more, because notwithstanding the Forfeiture it exists in the Crown; and for the latter, the proper Judgment to be given is only for Ouster. I do not think a Judgment for Seizure, where 'tis a final Judgment, to be infernal. And it is no Argument to say, that because the King cannot be the Corporation, he cannot seize; for the Meaning of Seizure is to take it from him that had it. But the Liberty of the Mayor, Commonalty and Citizens of London, is not their Liberty of being such Persons, for it has been held, that the Surrender of the Liberty of a Corporation, was no Surrender of the Corporation; no more shall a Judgment of seizing the Liberties of the Corporation, seize the Corporation itself. I must agree, that if a Corporation to a particular Purpose, be deprived of all its Powers and Liberties, 'tis gone, as in the Case of a Charity: Now for another Corporation, they have Power to make By-Laws, and govern the Place; and tho' they have their Liberties seized, yet they remain a Corporation, and may act as such. And that was the Reason of the Dean and Chapter of Norwich's Case, that they were useful still, as Assistants to the Bishop. 'Tis not the Privilege of the Corporation to govern and make By-Laws, but it is essential to its very Being and Constitution.

2 Inst 270.  
Hiz. Corpor.  
58, 78  
3 Jones 166.

There is another Clause upon which another Writ doth lie, but we are not to advise. And we cannot consider this Judgment otherwise than as the Act doth recite it; no peremptory Mandamus.

The City of Exeter *versus* Glide. Hill. 3 W. & M.

**I**n this Case of a Mandamus for restoring an Alderman, the Return was held good by the Opinion of three Judges, but the Chief Justice was of a dissentient Opinion. (3.) 4 Mod. 33, 36.

Holt C. J. I agree, that deserting his Office was good Cause of Disfranchisement; and so was absenting himself from the Council, and that the very Nature of the Thing did import as much: For every Alderman of a Corporation ought to be a Citizen, and an Inhabitant of the Place where he is an Alderman; and if he removes, he ceases to

Moor 135,  
833.

be a Citizen, but may be a Freeman, tho' he wants that Qualification which enables him to be an Alderman. There is no Doubt that it was his Duty to attend at the Common Council; and that it was contrary to the Duty of his Office to be absent. But what makes the Return not good is, that there was no particular Summons for the Defendant to appear and answer what should be objected against him; and therefore they had proceeded against him without hearing; and if so, his Disfranchisement was against Right and Justice.

4 Mod. 37.

Note; In Michaelmas Term 7 W. 3. one Morris brought a Mandamus to be restored to the Place of Capital Burgeſs of the Devizes in Wiltshire; and there being no Mention made in the Return, that he had any Notice or particular Summons to answer the Charge, for this Reason Judgment was given in that Case, that the Return was ill, pursuant to the Opinion of the Chief Justice.

### Piper *versus* Dennis.

(4.)  
Cases W. 3.  
293.

**UPON** a Quo Warranto against the Town of Liskard, in King Charles the Second's Time, they surrendered their Charter, which was not enrolled till King James the Second, who in Consideration of the Surrender, granted a new Charter to them.

Per Cur'. The Second Charter, being in Consideration of a void Surrender, was also void.

### Lord *versus* Francis. Trin. 12 W. 3.

(5.)  
Cases W. 3.  
408.

**PER** Cur'. An Action for a false Return is local, but may be laid in the County where it was made, or in that in which it appears on Record.

And per Holt C. J. If one be irregularly chose at first, and after he is owned by the Town, and entered into the Town Book, or regularly chose into a superior Dignity, I should take what followed to be such Evidence of a good Election, as ought not to be controverted.

Trin. 12 W.  
3.  
Cases W. 3.  
410.

Holt C. J. If an Officer make an ill Return, he shall be amerced; and we will not allow him to quash the ill Return, and make another. And if upon Disallowance of the Return,

Return, he makes a second bad Return, an Attachment shall go.

College of Physicians *versus* Salmon. Trin.  
13 W. 3.

**P**ER Holt C. J. Where my Lord Coke says that a Corporation must have a Name, it is to be understood either as expressed in the Patent, or implied in the Nature of it. As if the King should incorporate the Inhabitants of Dale, with Power to chuse a Mayor annually; in this Case, though there be no Name of Incorporation given in the Patent, yet it is a good Corporation, by the Name of Mayor and Commonalty. So the City of Norwich was incorporated by the Charter of Hen. 4. to be Mayor and Sheriffs, and they are called Mayor, Sheriffs and Commonalty. (6.)  
1 Salk. 197.  
5 Mod. 327.  
10 Rep. 29.

The Mayor of Thetford's Case. Hill. 1 Ann.

**A** Mandamus being sent to the Mayor and Commonalty of Thetford, the Return was made in the Name of the Corporation, but without the Common Seal, or the Hand of the Mayor to it. It was objected, that though it was returned in the Name of the Corporation, yet it was no corporate Act, to charge them; nor the Mayor, without his Hand. (7.)  
3 Salk. 103.

Holt C. J. A Corporation may do an Act on Record without their Common Seal, though they cannot do an Act in Pais; and if an Action be brought against the Corporation here for a false Return, they are estopped to say, that it is not their Return, for it is Responsio Majoris & Communitatis upon Record. And as to the Hand of the Mayor, it is not necessary; 'tis sufficient Evidence against him, that the Writ was delivered to him, and that it hath his Return; and it is incumbent on him to shew the contrary: For the Mayor, or any other Magistrate of the Corporation, who caused or procured this Return, are chargeable not only in their corporate, but in their private Capacities. No Officer was obliged at Common Law to sign a Return; indeed the Statute of York obliges Sheriffs to do it; but this extends not to a Coroner, Mayor, or other Officer. 10 Rep. 68.  
Moor 676.  
1 Leon. 184.  
Yelv. 34.



## C O S T S.

The Company of Cutlers in Yorkshire *versus* Rullin. Mich. 5 W. & M.

( 1. )  
Skin. 363,  
367.

**I**N an Action upon a private Act of Parliament, for a Penalty for retaining an Apprentice against the Act.

Per Holt C. J. & totam Curiam, Where a Statute gives a Penalty to the Party grieved, to be recovered by Action, Bill, Plaint, &c. this being a Duty to the Party vested before the Action brought, he shall have Costs; because he is put by the Defendant to the Costs and Trouble of a Suit. But in a Tam quam or other popular Action, where the Duty is not vested till the Suit or Information brought; there his Interest commencing by the Suit, and not being a Duty vested before, he shall not have Costs against the Defendant. 10 Rep. Pinfold's Case 115. North and Wingate's Case, 1 Cro. 559. At another Day Costs were given in this Case per Cur'.

Skin. 367.

*Sir Wilfred Lawson and Story.* Mich. 6 W. & M.

( 2. )  
Skin. 555.

**I**N an Action upon the Case upon a Rescous, upon the new Statute of Distresses, the Question was, after a Verdict and Judgment for the Plaintiff, if the Costs shall be treble, the Words being treble Damages and Costs; and ruled without Difficulty, that they shall, according to the Rule in Pinfold's Case, 10 Rep. Damages in such Case being given by the Common Law; and it was ruled that Costs de incremento shall be treble also. And so upon Debate it was ruled in C. B. in the Case of Sandys and Child, affirmed here in a Writ of Error. And though the Case of Roll's, Costs 517. be, that the other is the more sure Way, yet per Holt C. J. Costs de incremento are also double, &c. in all Cases of Officers, &c.

Anonymus. Hill. 11 W. 3.

**I**T was moved that the Transcript in B. R. might be amended by the Record in the Common Pleas, the Clerk of their Treasury attending. Hall opposed it, 'till they had the Costs of the Writ of Error allowed them. (3.)  
1 Salk. 49.

Et per Holt C. J. You should have insisted for the Costs in C. B. before the Party had Liberty to amend. This Way of amending the Record here by the Record there is the Course of the Court, and cannot be opposed, being only to save the Charge of a Certiorari. Vid. 1 Lill. 67.

## Cottages and Inmates.

The King *versus* Everard. Hill. 13 W. 3.

**A** Presentment at a Court-Leet, for erecting a Cottage, contrary to 31 El. cap. 7. not laying four Acres of Land to it, according to the Statute de terris mensurandis. It was excepted first, That this was but an Ordinance, 2 Cro. 603. But per Cur', 'twas held a Statute. 2dly, That the Caption is ad Cur. Vis. Franc. pleg. cum Cur. Baron, whereas the latter Court has no Authority to take such Presentments, ergo it is illegal, because incertain which took it. 2 Keb. 139. 10 Ed. 4. 15. a. (1.)  
1 Salk. 195.

Et per Holt C. J. Where there are several Commissions, of which each have Authority to proceed for the same Thing, but in a different Manner, it ought to appear by which of these it was taken. But here only one Court has Jurisdiction in the Matter, and it must be taken as a Caption by that Court that had Authority. 3dly, That the Plea of our Lord was in English Figures; but the Plea of the King being at length, the Anno Domini was held Surplusage. Cro. Car. 80, 413.

Emerton *versus* Selby. Hill. 2 Ann.

( 2. )  
1 Salk. 169.

1 Bulst. 50.  
3 Keb 44.  
3. C. 6 Mod.  
114. Anony-  
mus.  
2 Brownl.  
101.  
Vaugh. 253.

**T**HE Defendant in Replevin abowed for Damage-feasant in his Freehold. Plaintiff pleaded in Bar, That he was seised of a Cottage, and prescribed to have Common, &c. for all Beasts levant and couchant, as appendant to his Cottage. This was held good upon Demurrer, for a Cottage contains a Curtilage as to this; see the Statute De extentis Manerii, and by the Statute, ought to have four Acres of Land.

And Holt C. J. said, He remembered an Issue whether levant and couchant tried before Chief Justice Hale, who held the Foddering of the Cattle in the Pard Evidence of Levancy and Couchancy. Vide Co. Lit. 5. Co. Ent. 649.

## COVENANTS.

Scounten *versus* Hawley. Mich. 1 W. & M.

( 1. )  
Com. 172.

**C**ovenant upon Articles of Agreement, one of which was, that whereas the Plaintiff had informed the Defendant, that Bradshaw, one of the Regicides, was Portgago of such and such Lands, which Discovery the Plaintiff had made, to the Intent to entitle the Duke of York to those Lands, as forfeited by the Attainder of Bradshaw, (whereas in Truth, Bradshaw was only Trustee of the Term for another.) The Defendant covenants to obtain a Grant of those Lands from the Duke of York to the Plaintiff, within such a Time; and assigns for Breach, that the Defendant had not procured such a Grant, &c. The Defendant pleads, that at the Time of the Articles entered into, the Duke of York had no Interest or Title to the Lands; the Plaintiff demurs.

Holt C. J. The Defendant is bound to procure such a Grant, et valeat quantum valere potest. And it was adjudged that the Plea was naught, by Holt, Dolben and Eyre.



Brewster *versus* Kitchel. Hill. 9 W. 3.

**I**N a feigned Action upon the Case on a Wager, to settle a Difference relating to the Deduction of Tares out of a Rent-Charge. Here A. being seised of Lands in Fee, granted a Rent-Charge to one B. and his Heirs, and covenanted for farther Assurance, and to pay the Rent-Charge clear of all Tares; now by the Land-Tax Act 3 & 4 W. & M. 4 s. per Pound is laid upon Land, and Power given to the Tenant to deduct it, with a Proviso not to alter Covenants or Agreements of Parties; all which was found in a special Verdict.

(2.)  
1 Salk. 198.  
Carthew 438.

Holt C. J. The Heir of the Grantee cannot maintain an Action of Covenant against the Assignee or Lessee of the Grantor, but only against the Grantor and his Heirs; for a Warranty, though a Covenant Real, does not bind the Land, till Judgment had in a Warrantia Chartæ, much less that which is only a personal Covenant. And where the Question is, whether a Covenant be repealed by Act of Parliament, this is the Difference; if a *Han* covenants not to do an Act or Thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the Statute repeals the Covenant: So it is, where he covenants to do a Thing which is lawful, and an Act comes in and hinders him from doing it. But if one covenant not to do a Thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the Covenant. In this Case, though the Act which gives 4s. in the Pound, hath a Clause that the Tenant shall deduct it out of the Rent charged thereon, yet that doth not repeal the Covenant to pay it without Deduction, for he doth not offend the Statute if he does not deduct; but he breaks his Covenant if he doth; wherefore the Covenant ought to be performed. Such a Covenant made when there was no Parliamentary Tax in Being, or known at that Time, would not have freed the Rent-charge from the Tax imposed by this Act; but because there was such Tax before the Grant, this Covenant must be construed to extend to it, for otherwise it would signify nothing.

5 Rep. 17.  
Dyer 27,  
257.  
Cro. Car.  
221.  
1 Jon. 245.  
1 Lev. 109.

Northcote *versus* Underhill. Mich. 10 W. 3.

(3.)  
1 Salk. 199.

Raym. 27.  
1 Keb. 130,  
164, 183.  
1 Lev. 46.  
3 Lev. 193.

**I**N Covenant, the Plaintiff declared that the Defendant by his Deed did grant, &c. to the Plaintiff and his Heirs, provided that if the Grantor paid so much Honey, it should be lawful for him to re-enter, and that he covenanted to pay the Honey to the Plaintiff, and a Breach was assigned in Non-payment; after Judgment by Default, and a Writ of Inquiry executed, 'twas objected, that nothing passed by the Deed for Want of Inrollment; quod fuit concessum; and objected, that therefore the Covenants were void, like the Case of Ray. 27. where H. grants all the Residue of his Term which should be unexpired at the Time of his Death, and covenants for quiet Enjoyment, and gives a Bond to perform; and it was held that the Bond and Covenant were void.

Et hoc fuit concessum, per Holt C. J. because that was a relative dependant Covenant, if there be no Estate granted the Covenant fails; but in this Case, the Covenant is a distinct independant Covenant, and it is not material whether any Estate passed, and the Plaintiff need not shew it.

Judgment for the Plaintiff.

Farrow *versus* Chevalier. Trin. 11 W. 3.

(4.)  
1 Salk. 139,  
140.

**T**HE Servant covenanted not to buy or sell without the Master's Leave within two Years. Breach assigned, that he had diversis diebus & vicibus, between such a Day and such a Day, sold to H. and to several other Persons unknown, Goods to the Value of 100 l. Issue, and Verdict for the Plaintiff; and moved in Arrest of Judgment, that the Breach was uncertain as to Times and Persons. Cases cited pro and con, 3 Cro. 916. 2 Cro. 567, Ray. 8, 9, 10. Sty. 420, 428.

Et per Holt C. J. In Debt on a Bond to perform Covenants, the Replication must shew a certain Breach; but in Covenant, a general Breach is sufficient. And this is certain enough, for 'tis so described, that if another Action be brought, the Defendant may plead a former Recovery, and aver this to be the same Selling.

Judgment pro Quer'.

1 Lev. 94.  
Cro. Jac. 486.  
Cro. Car.  
176.  
1 Brownl. 23.  
2 Mod. 176.  
2 Jon. 125.

Grescot *versus* Green. Pasch. 12 W. 3.

**L**essee covenanted for him and his Assigns to re-build a House within such a Time; after the Time expired, he assigned over, &c. the House not built. (5.)  
1 Salk. 199.

Et per Holt C. J. This Covenant shall not bind the Assignee, because it was broke before the Assignment; aliter if Lessee had assigned before the Time expired. Gould. 129.  
Cro. El. 457.  
Moor 399,  
400.  
Pl. 523.

Sleer *versus* Shalecroft. Pasch 12 W. 3.

**C**ovenant for not conveying an Estate pursuant to Articles. (6.)  
Cases W. 3.

Holt C. J. There is a manifest Difference between a Covenant to make a Conveyance at the Charge of the Covenantor, and a Covenant to convey to Covenantor, and he covenants to be at the Charge of it; for in the first Case, the Covenantor is not obliged to perform till Tender of the Charges; but in the second he is to convey at his Peril; and if the Covenantor will not pay, he has his Remedy against him upon his Covenant. But where Covenant is to make Conveyance at the Charge of the Covenantor, the Covenantor ought to give Notice to the Covenantor what sort of Conveyance he intends to make, that the Covenantor may judge what Charge to tender. 2dly, When one pleads a Deed, he must plead it according to its legal Operation, and not according to the Words thereof. 3dly, If Covenant be to make a Feoffment, &c. before such a Day, Covenantor ought to give Notice when he will make it, that Covenantor may be there to receive it; secus if it be to make a Feoffment on a Day certain; but in that Case, Covenantor must plead a Tender on the last convenient Time of that Day.

Holt C. J. If A. Covenant with B. to convey him all his Right and Title to the Manor of D. to which A. has no Right; it is not a good Plea in an Action of Covenant, that he had no Right, &c. but he must make such a Conveyance, as would in Truth pass all his Title, in Case he had any; and he is estopped by his Covenant to say he had no Title. Pasch. 12  
W. 3.  
Cases W. 3.  
399.



Trin. 12  
W. 3.  
Cases W. 3.  
406.

Holt C. J. It is by Indulgence that Seamen sue for their Wages in the Admiralty, but that was never extended to Masters, but once in my Lord Herbert's Time; for the Master's Case differs from that of Mariners, for he contracts with the Part-Owners, and the Mariners with him; a Prohibition is a Matter of Right, with some Restrictions.

Lacy *versus* Kinnaston. Trin. 13 W. 3.

(7.)  
3 Salk. 298.  
2 Salk. 573.

**T**HIS Case is not stated in the Books; but only that it was held by Holt C. J. That a perpetual Covenant never to take any Advantage of a Deed or Covenant, is a Release or Discharge of that Deed or Covenant; as where a Man enters into an Obligation to another, who covenants never to take any Advantage, or to sue him upon that Bond; here if afterwards an Action of Debt should be brought upon it, in such Case the Obligor may plead this Covenant in Bar to the Action, for the Obligee by his Covenant hath deprived himself of all the Remedy he could have upon this Bond. But if A. B. and C. D. are jointly and severally bound in a Bond to E. F. who covenants never to sue C. D. upon that Bond; this is no Release or Discharge of the Bond, because it doth not discharge the Right, only the Remedy against C. D. for he still hath a Right of Action against the other Obligor; and therefore if the Obligee should bring an Action of Debt upon this Bond against C. D. he is put to his Action of Covenant against the Obligee, upon the Covenant entered into.

Vivian *versus* Campion. Pasch. 4 Ann.

(8.)  
1 Salk. 141.

**T**HE Plaintiff as Heir declared, That his Ancestor did demise, and that the Lessee covenanted to Repair, from Time to Time, and to leave in Repair; and then shewed that his Ancestor died Anno 10 W. 3. and for Breach assigned, quod primo Apr. anno tertio Regine nunc, & per 10 annos ante tunc the Premises were out of Repair. Verdict for the Plaintiff. It was moved in Arrest of Judgment, That Part of the ten Years incurred in the Life of the Ancestor, and that this was a hard Action.

1 Vent. 109.  
Far. 86.

Et per Holt C. J. If the Premises were out of Repair, in the Time of the Ancestor, and continued so in the Time

of the Heir, it is a Damage to the Heir, and the Damages are given to put the Premises in Repair, and not in respect of the Length of Time they continued in Decay. This is not a hard Action, and good Damages are always given in these Cases, to be applied to the Repair of the Premises.

## COUNSELLOR.

Adams *versus* Tertenants of Savage. Pasch. 3 Ann.

**I**N a Case Mr. M—— formerly an Attorney of the Court, (now Counsellor at Law) was accused of foul Practice in his Profession. The Court said, Though he be now a Counsel, yet perhaps that will not discharge him from being an Attorney still, and then we may get his Demands taxed as such. A Counsellor is a kind of Minister of Justice and Right, and as such punishable for Misbehaviour in his Profession. 6 Mod. 134, &c.

And Holt C. J. said, Will you have the Point tried, whether a Counsellor at Law may commit Extortion?

## COURTS.

Andrews *versus* Sir Robert Clarke. Pasch. 1 W. & M.

**A.** Brought an Action of Debt on a Bond against B. in the Court of the Sheriffs of London; ( 1. )  
Com. 109.  
C. is indebted to B. by Bond: A. sues out a Scire Facias against C. quare attach. non, C. the Garnishee appears, and imparts, and afterwards pleads, that the Bond made by B. to A. was made in such a County, out of the Jurisdiction of the Sheriff's Court, which Plea was refused, and a Prohibition was moved for in B. R. on a Suggestion of this Matter.

Holt

Holt C. J. The Garnishee cannot plead to the Jurisdiction after an Imparance, and therefore they have well refused the Plea to the Jurisdiction; for an Imparance is an Admission of the Jurisdiction.

And a Prohibition was denied.

Hudson *versus* Fisher. Mich. 1 W. & M.

(2.)  
Com. 170.

**O**NE deviseth Lands and Chattels by his Will to several Persons. It was ruled by the Court, that no Prohibition shall go in any manner to the Ecclesiastical Court, to restrain the Probate of the Will, for the Probate doth not affect the Devise of the Land, although 3 Cro. 346. was objected.

To which Holt C. J. answered, That it had been adjudged contrary to that Case ever since.

Dolben J. First a Prohibition in this Case was granted absolutely; then it was granted only quoad the Lands; but for these many Years last past, no Prohibition at all hath gone.

Eyres J. agreed; and it was ruled that there should be no Prohibition.

Lord Lovelace, Chief Justice in Eyre, *his Case*.  
Mich. 1 W. & M.

(3.)  
Com. 159,  
160.

**S**everal Persons appeared by Habeas Corpus cum causa, and the Cause of their Commitment appeared to be upon the Warrant of Lord Lovelace, Chief Justice in Eyre of the Forest, which was executed by a Messenger, upon their having Timber of the Forest found in their Parks.

Holt C. J. The Statutes cited, 'tis true, do not exclude the Chief Justice in Eyre from committing 'till Presentment, by express Words, but yet he is within the general Words of them. Nota; the Words of 1 Ed. 3. 8. Church-warden, and other Ministers; the Words of 7 R. 2. are, None shall be taken by any Officer of the Forest.

Eyres J. An Excuse of Justification of an Imprisonment ought to be shewn by the Party committing, if the Forest Law justifies the Commitment. 3 Leon. 218. Russel's Case; and I conceive clearly, that the Chief Justice cannot commit, but only where the Party is taken in the Manner, scilicet with bloody Hands, or with Menison in the Forest, or in the



the Act of cutting down Trees, &c. but if Timber be found in my Ward, which was cut in the Forest, that is not in the Manner. To which Dolben J. and the rest agreed.

Afterwards the Court discharged the Prisoners.

*Parker versus Edwards & al.* Trin. 4 W. & M.

**T**respas for Assault and false Imprisonment against the Defendant, who was Vice-Chancellor of Oxford. (4.)  
1 Show. 352.

The Chancellor claims Conusance by Attorney, and sets forth the Privileges of the University confirmed by Act of Parliament, which directs it to be allowed, upon any Notification or Signification of such their Privilege; but rejected per Cur. because he had no Warrant of Attorney in Latin under the Seal of the Chancellor; for it ought to be claimed either in Person or by Attorney, or otherwise there is no Party in Court to claim it.

*Brig versus Adams and Wilkins.* Hill. 5 W. & M.

**I**n Trespass, Assault and false Imprisonment, the Defendant justifies the Imprisonment, for that Bristol is an ancient Borough, and that upon the fifteenth Day of July 3 W. & M. the Defendant Adams levied a Plaint in the Court there held before the Mayor and Aldermen of Bristol, de placito trans. super cas. ad dam. 4 l. against the Plaintiff Brig, and declared for 3 l. 15 s. to which Brig pleaded Non assumpsit, and the Jury gave 5 s. Damages, but the Costs were 54 l. for all which the Defendant Adams had his Judgment, and thereupon sued out a Ca. Sa. by Virtue whereof the Defendant Wilkins took the Plaintiff Brig in Execution, &c. (5.)  
Com. 235.  
&c.

The Plaintiff confesseth the Plaint, Judgment and Ca. Sa. and sets forth a private Act of Parliament made 13 Feb. 1 W. & M. creating a Court of Conscience in Bristol, to determine Debts under 40 s. from which there should be no Writ of Error or Appeal, &c.

And if such Person begin or prosecute any Suit in any Court at Westminster, &c. against any Inhabitant of Bristol; for Damage, &c. which shall appear at the Trial to be under 40 s. no Judgment to be entered, and if any be entered, to be void, and the Defendant to have Costs: Avers, that

at the Time, &c. the Plaintiff and Defendant were Inhabitants of Bristol, and therefore the Judgment void.

The Defendant rejoins, that at the Time of the Pleint, the Defendant below was indebted to him in 4l. that at the Trial and before Judgment, neither the Plaintiff, nor any other on his Behalf, did pray the Benefit of the said Act, or give Notice to the Court thereof. The Plaintiff demurs.

Holt C. J. delivered the Opinion of the Court, that the Action did not lie; and that the Judgment was only voidable, so that the Execution was lawful; and cited 2 Inst. 670. for Construction of Statutes.

Take the same Case as reported by Skinner.

*Brig and Adams.* Pasch. 5 W. & M.

(6.)  
Skin. 350,  
366, 407.

**I**N Trespas of Assault, Battery and false Imprisonment. The Defendant justified under a Judgment and Execution in the Court of Bristol, as an Officer of the Court. The Plaintiff replies, and pleads the Statute of W. & M. for erecting a Court of Conscience for Relief of the poor Inhabitants of Bristol in Actions of Debt, &c. under 40 s. and shews, that the same Persons who are Judges of the Court of Record, are Judges of the new Court, &c. but he does not shew that the Judges or Plaintiff there had Notice of the Act, or that the Defendant was an Inhabitant of Bristol.

And upon a Demurrer, Holt C. J. said, Tho' it be a private Act of Parliament, of which the Courts here cannot take Notice without its being pleaded, yet as to Bristol, it is become Lex Loci, and all Parties concerned there ought to take Notice of it. The By-Laws of a Corporation are more private than such an Act of Parliament; but if any Man comes into a Corporation, he ought to take Cognizance of their By-Laws at his Peril; therefore he thought that the Judges of the Court of Record of Bristol ought to take Notice of the Act for erecting the Court of Conscience. And he said, The Act makes a Nullity of their Proceedings, so that the Defendant might have such an Action against a Plaintiff who proceeds against the Act. But he held clearly, that as to the Officer, he shall be acquitted.

In another Term. The Court gave Judgment, and ruled that he ought to have pleaded this Matter, and shewn that

he was an Inhabitant, if he would have the Benefit of the Act; but if the Party had pleaded it, and after they had proceeded there, he might have an Action. 2 Inst. 670. The Case of the Outlawries was cited by Holt C. J. as a Case in Point.

Curling (*vel* Hurling) *versus* Long. Pasch.  
6 W. & M.

THE Court was moved for a Prohibition to the Chancery-Court of the Cinque Ports, where a Bill was exhibited setting forth a Custom, that every Ship that used the Pier of Ramsgate, should pay 4 d. per Pound for all their Settings, for the Maintenance of the Pier; and prays a Discovery of the Defendant's Settings, and whether there hath not been such a Custom, and to be relieved, and says it belongs to that honourable Court to see the Duty levied. The Defendant admits by his Answer, that the 4 d. per Pound hath been taken by Charter, by Law, or some other way, but says the Custom is triable at Law.

(7.)  
Com. 261.

Holt C. J. A Prohibition here is not to try the Custom, and after to send a Consultation to proceed, as in the Ecclesiastical Court; for here the Chancery wants original Jurisdiction of the Cause; and yet if the Pier-Wardens (who are chosen yearly by the Custom) are no Corporation, they cannot sue at Law. We'll be tender of Matters which concern Navigation, but I know not how to intitle a Court of Equity to lay a Charge on the King's Subjects. The Bill may be good for the Discovery, but it is naught for the Custom; you must not proceed to try that there.

The King *and* Green. Mich. 8 W. 3.

Serjeant Pemberton moved for a peremptory Mandamus after a Verdict in C. B. in an Action on the Case for a false Return to a Mandamus to intrude a Chapel upon the Act for Liberty of Conscience; to which it was returned, that this was a consecrated Chapel of Ease for the necessary Use of the Inhabitants of such a Parish.

(8.)  
Skin. 670.

But Holt C. J. said, that they could not take Notice here of a Verdict in C. B. and the Verdict ought to be, as he thought, here in B. R. and therefore he did not grant the Motion.

Groenwelt



Groenwelt *versus* Burwell. Trin. 12 W. 3.

(9.)  
1 Saik. 144,  
200, 397.

**T**HE Plaintiff being condemned, fined and imprisoned, by the Censors of the College of Physicians, for administering bad Medicines; the Question was, Whether Error would lie on this Judgment, or a Certiorari?

1 Reb. 818.  
2 Keb. 129.  
3 Mod. 94.  
8 Rep. 60.  
11 Rep. 43.  
9 Rep. 68.  
Cart. 19.

By Holt C. J. Error will not lie on the Judgment, because their Proceedings are not according to the Course of the Common Law, but without Indictment or formal Judgment. But a Certiorari lies; for no Court can be intended exempt from the Superintendency of the King in this Court of King's Bench. It is a Consequence of every inferior Jurisdiction of Record, that their Proceedings be removable into this Court, to inspect the Record, and see if they keep themselves within the Limits of their Jurisdictions. And as wherever a Power is given to examine, hear and punish, it is a judicial Power, and they in whom 'tis reposed as Judges; so where a Jurisdiction is created with Power to fine and imprison, that is a Court of Record, for the very lodging this Power in them, makes them Judges of Record. But here no Action lies against the Censors, because it is a wrong Judgment in a Matter within their Jurisdiction; and a Judge is not answerable for the Mistakes of his Judgment, in a Matter of which he has Jurisdiction.

Anonymus. Pasch. 1 Ann.

(10.)  
1 Saik. 201.  
Far. 1.  
Lutw. 588.  
Far. 44.  
Cumb. 124.  
2 Lev. 81.

**I**F a Jury in an inferior Court will not agree on their Verdict, they are, as in other Courts, to be kept without Meat, Drink, Fire or Candle, 'till they agree; and the Steward may from Time to Time adjourn the Court 'till they do agree.

Hall *versus* Hill & al. Mich. 1 Ann.

(11.)  
Farrell. 84,  
85.

**A** Verdict and Damages were obtained for the Plaintiff in a Court at Bristol, of which the Defendants were Judges; and the same Day he has Costs taxed by the Town-Clerk, and takes out a Capias against the Principal; and upon Return thereof, a Sci. fac. against the Bail, who after the Return of the second Writ surrendered the Principal;

cial; and then a Year's Time being elapsed; the Court granted a new Trial: Upon which, on Complaint; a Rule was made for an Attachment, *nili*.

'Twas here insisted for the Defendants, that if they had mistaken that to be a Cause for a new Trial which was none, that was only an Error of their Judgment, for which they are not punishable. And though in this Case the new Trial was granted after a Writ of Error allowed, that will not alter the Case; and until the Judgment is entered, the Hands of the Court are not tied from granting a new Trial at any Time.

Holt C. J. The Writ of Error ought not to be allowed before the Judgment given. And though a Judge is not punishable for an Error in Judgment, it is rare for the same Judges to grant a new Trial before themselves, as here after a Trial at Bar; but 'tis usual to grant such new Trial after a Trial at *Nili Prius*, though that is ever on fresh Pursuit, the very next Term. Now in this Case it was granted after a Year, when Costs were taxed, and as much Entry of a Judgment as is usual there, and Execution taken out: And it is no Excuse for the Defendants to say they are not Lawyers, for they ought to have Advice of Lawyers; and if they presume to take upon themselves the Knowledge of the Law, it ought not to be suffered, though there be no Corruption in them. But he said, they would not grant an Attachment for an Error of Judgment, where it is Matter within their Judgment; but where it is not so, and they have already given Judgment, why should not Attachment be granted;

Mod. Caf.  
132, 231.  
2 Show. 79,  
147.

Per Cur. it was adjudged, That the Rule for new Trial should be set aside, and Rule for Attachment discharged, upon Payment of Expences of the Complainant, and Judgment entered in the Court below as of due Time.

Reignol *versus* Taylor. Mich. 1 Ann.

**E**rror of a Judgment in Trespass in an inferior Court; (12.)  
Exception was, that in the Record sent up, in the Farrell. 103.  
Style of the Court, they do not say, that it was held within the Jurisdiction of the Court.

Holt & Cur. Where the Declaration is in the inferior Court, it ought to lay the Fact or Cause of Action to have arisen within their Jurisdiction; or if you declare, that at a Court held at M. such a Thing was done, there you

1 Lev. 50, 69.  
2 Lev. 87,  
230.  
1 Mod. 32.  
2 Mod. 141.

must say, that the Court was held within the Jurisdiction; but when you only set forth the Style of a Court, you need not shew it.

Farrell. 4.

By Holt C. J. A Summons of a Party need not be cramp't up by Words to the Jurisdiction of the Court; for that shall be understood. It is the constant Practice in all inferior Courts, to make the Process in the Name of the Mayor.

### Lucking *versus* Denning.

(13.)  
1 Salk. 201.

**I**N an Action of Debt upon a Bond sued in the Court of the Sheriffs of London, it appeared that the Bond was made out of the Jurisdiction of the Court; and thereupon it was objected, that the Proceeding upon this Bond was coram non judice, and all void, and that the Serjeant who executed the Process was a Trespasser, &c.

2 Lutw. 1565.  
5 Mod. 335.  
1 Saund. 98.  
1 Lev. 95.  
2 Mod. 196.

Holt C. J. Where an inferior Jurisdiction is confined to Persons, if it appears on the Face of the Declaration, that the Persons who sue are qualified for it, though in Fact they are not; yet if the Defendant doth not plead to the Jurisdiction, but comes in and admits it, he shall never have Advantage of this afterwards, but is estopped and concluded. But if it is not averred in the Declaration, that the Person is qualified to sue, and within their Jurisdiction, all the Proceedings are void, and coram non judice, and Trespass lies against the Officer. So where the inferior Court is confined to some particular Things, and the Suit there is for something else, of which they have not Jurisdiction, all is void, and no Admission can make it good. But when they are confined to Place, viz. to all Contracts arising within such a District, though the Contract arise out of the Liberty, the Court may award Process; and the Officer may execute it, for he is not bound to enquire either into the Cause of Action, or where it arose, unless it appear to him that it be out of the Jurisdiction. And here if the Plaintiff declares of a Matter as within the Jurisdiction, when it is not, the Defendant is to plead to the Jurisdiction of the Court; and if that be over-ruled, he may have a Prohibition: Though if he waives that, and pleads to the Merits, he cannot then have Prohibition, nor may he take Advantage of their Want of Jurisdiction; for by the Averment of the Court,

and



and his own Admission, he is estopped to say that it was a Matter which arose out of the Jurisdiction of the Court.

To this Powel J. and the rest agreed: Judgment for the Plaintiff. It has been held, that the Practice of a Court is the Law of the Court, from which the Judges could not depart, or vary from its settled Rules: Per Holt C. J. Skins. 273

Fletcher *and* Ingram. Hill. 7 W. 3.

**I**N Replevin the Defendant made Conusance as Bailiff to R. F. and said that the Place where is within Shenston, and that Shenston is within the Manor of, &c. and shews a Custom for a Jury to elect one of the Resiants to serve the Office of Constable for a Year, and said that they elected such one to be Constable for the Year ensuing, and to take his Oath under a Penalty of 40 s. and at the next Court it was presented that he did not take the Oath, and for this 40 s. a Distress was taken, &c. the Bailiff demurred to this Abowry; for the Defect of a Custom to distrain; and for Want of alledging of Notice, the Court held the Abowry to be ill: For this is a Duty by the Custom, and therefore a Remedy in such a special Manner ought to be by Custom likewise, and there ought to be an express and precise Notice, & statim postea is not sufficient. ( 14. )  
Skins. 635.

And Holt C. J. cited a Precedent in Winch's Entries, that there ought to be an express Notice, and it was adjudged for the Plaintiff.

The Mayor, &c. of Winton *versus* Wilks. Pasch.  
4 Ann.

**A**N Action on the Case was brought by the Corporation of the City of Winchester, wherein they declared, Quod nunc Winton est antiqua Civitas, and that there was a Custom there, Quod non liceat alicui, præter homines liberos de Gild. Mercatoria Civitatis prædictæ, to exercise a Trade in the said City, unless being brought up an Apprentice to it within the said City, that the Defendant nevertheless did exercise, &c. upon Motion in Arrest of Judgment, the Cause was set down in the Paper, to the End it might be determined, whether there could be such a Custom in any City but London, which (it was said for the Plaintiff) was settled for London in Waggoner's Case. ( 15. )  
1 Salk. 203,  
204.  
Mod. Cases  
21.

Holt

Holt C. J. Notwithstanding Waggoner's Case, such a Custom and a By-Law upon it; came in Question in the  
 Cart. 68, 114. 19 Car. 2. in C. B. in the Case of the Town of Colchester, and was not determined: All People are at Liberty to live in Winchester, and how can they be restrained from using the lawful Means of living there. This was the Cause of making the Statute of 5 El. Such a Custom is an Injury to the Party, and a Prejudice to the Publick. The Case of London differs, they have by Custom the bringing up of the Youth of the City, and to make Infants Apprentices, to assign Apprentices, and by Custom after such Apprenticeship they are free. Other Cities have no such Custom. 2dly, This Declaration is naught. The Action ought to be brought by the Gilda Mercatoria, how is the City prejudiced? Non constat to us, whether the Guild here be the whole Town, or Part, or what Part of the Town, nor by what Right there is any Gilda Mercatoria there. Powell, Powys, and Gould concurring, Judgment for this Fault in the Declaration was for the Defendant.

## Custos Rotulorum.

The King and Queen *versus* Evans. Pasch.  
 3 W. & M.

( 1. )  
 4 Mod. 31,  
 32.  
 1 Show. 282.

**A** Custos Rotulorum of a County being displaced, and another appointed in his Room, the Defendant, who was Clerk of the Peace, refused to deliver up the Rolls to him; on which he was indicted and found guilty, and for this Misdemeanor removed from his Office by Order of the Justices; and now he brought a Mandamus to be restored.

By Holt C. J. The Clerk of the Peace, tho' he has a more fixed Estate in his Office than the Custos Rotulorum hath, yet still he is but his Deputy; but no Clerk of the Peace may be removed by Justices, without Articles exhibited in Writing: And he said, the Clerk of the Peace ought to make out all the Processes, which cannot be done without the Rolls, and when they are compleated, he must deliver them to the Custos; but as long as they are in  
 Pro.

Process, they should be with the Clerk of the Peace, and therefore it seemed reasonable that the Defendant should be restored. Three Judges were of a contrary Opinion in this; but afterwards, for Want of Articles in Writing against him, a peremptory Mandamus was granted.

Harcourt *versus* Fox. Hill. & Trin. 4 & 5  
W. & M.

**T**HE Earl of C. Anno 1 W. & M. was constituted by the King and Queen to be Custos Rotulorum for the County of Middlesex, and the Office of Clerk of the Peace being void, he by Writing under his Hand and Seal did appoint the Plaintiff to be Clerk, for so long as he should demean himself well, &c. And afterwards the said Earl was removed from his Office, and the Earl of B. by Letters Patent made Custos in his Stead, who by Writing under Hand and Seal did constitute the Defendant to be Clerk of the Peace of the said County, during the Time the Earl should enjoy his Office, and so as he well demeaned himself, &c. Here the Question was, Whether the Plaintiff being Clerk of the Peace by Appointment of the Earl of C. had a good Title to hold that Office during Life; or whether it was dependant upon the Custos, and determined by his Removal?

It was held in this Case, that the first Beginning of a Custos Rotulorum was in the 34th Year of King Edw. 3. And the Reason why he was appointed at that Time, was because the Justices of Peace could not then agree among themselves who should keep the Records; and upon Application made to the King concerning this Matter, he appointed a fit Person to keep them, and gave him the Custody of the Records in every County: Afterwards it became incident to the Office of the Lord Keeper to nominate the Custos Rotulorum; and then because of the Necessity of one to make Entries, and join Issues, the Custos appointed a Clerk for that Purpose, who is now called Clerk of the Peace. And as to the Case in Question, by the Statute 1 W. & M. the Custos hath Power to appoint a Person to execute this Office by himself or Deputy, for so long Time only as he shall demean himself well, &c. which Words do import an Estate for Life.

Holt C. J. As the Rolls and Records of the Sessions are by the Commission of the Peace put into the Hands of



Hob. 153.  
37 H. 8. c. 1.  
1 W. & M.  
c. 21.

the Custos Rotulorum, and the Clerk being the Person that must be trusted with the Rolls to make Entries upon, and draw Judgments, and to record Pleas, &c. therefore of common Right, by the Common Law of the Land, it belongs to him that hath the Keeping of the Records, to nominate this Clerk, and not to any one else: And it would be very unreasonable, that the Custos Rotulorum being intrusted with the Custody of the Records by his Commission, any other should be made Clerk of the Peace, for the actual Possession of such Records, than such as he should appoint; when upon any Loss or Miscalriage he is answerable for it himself. And before the Statute of 37 H. 8. the Clerk of the Peace was removeable at the Pleasure of the Custos, because he was his Clerk; but by that Statute he is made an Officer, and hath a durable Estate in his Office, and if he behaved himself well, the Custos could not turn him out: And I think since the Making of the Statute 1 W. & M. he hath an absolute Estate for Life in his Office independant upon the Custos, and determinable only upon Misbehaviour.

Judgment was given for the Plaintiff. See 1 Show. the Lord C. J.'s Argument at large.

King and Queen *versus* Owen. Trin. 6 W. & M.

( 3. )  
4 Mod. 293,  
295.

**I**N this Case Judgment was given, that no peremptory Mandamus should go; for by the Act of 1 W. & M. the Custos Rotulorum is to nominate a Clerk of the Peace to execute that Office for so long Time as he shall well demean himself, &c. and if he appoints him in any other Manner, he is no Clerk of the Peace: Therefore the Defendant being here appointed by the Earl of W. during Pleasure, 'tis not pursuant to the Statute, for he hath not executed the Authority given to him, and so the Defendant hath no Title to the Office.

## D A M A G E S.

Benbridge *versus* Day. Hill 3 W. & M.

**T**HE Plaintiff brought Trover for several Things, (1.) and among the rest *de duobus fulcris*; the Defendant demurred generally, and prayed Judgment. 1 Saik. 218.  
Holt C. J. refused to give Judgment *quod nil capiat*, but said the Plaintiff might take several Damages, and release as to this, and then have Judgment as to the rest, and all would be well in this Case.

*Sir James Herbert's Case.* Mich 7 W. 3.

**A** Distress was taken by the Overseer of the Poor for a Poor's Rate, and a Replevin brought; and on Not Guilty pleaded at the Trial, Evidence being given, and the Jury charged, and ready to give their Verdict, the Plaintiff became nonsuit, by which the Officer distraining was entitled to treble Costs and Damages; but the Jury departed without assessing the Damages: Upon which, the Court was moved for a Writ of Enquiry. (2.)

By Holt C. J. If upon a Demurrer on Evidence the Jury be discharged, there shall be a Writ of Enquiry of Damages, for the Jury do not give any Verdict, and therefore they cannot assess them; and the same Reason holds upon a Nonsuit, by which the Jury are discharged from giving their Verdict: But 'tis otherwise where they give a Verdict, for there a Defect of assessing Damages shall not be supplied by Writ of Enquiry; for in such Case the Jury have misdemeaned themselves, and if they had given Damages too high, &c. they might be attainted, and they are bound to give Damages; but 'tis not so in the other Cases. Afterwards at another Day he said, the Jury might have been charged with the Damages, but since they were not, there may be a Writ of Enquiry awarded. And here if the Jury had given a Verdict for Damages, this had been but an Inquest of Office, on which no Attaint would lie, if the Damages had been excessive; therefore there is no Default in the Jury, or

Skin. 593.  
5 Mod. 77,  
118.

1 Cro. 146.  
1 Roll. 272.  
2 Roll. 112.  
10 Rep. 118.  
Dyer 135.  
Raym. 170.  
1 Lev. 255.

Da.

Damage to the Plaintiff, if this be supplied by Writ of Enquiry.

Per Cur'. Let a Writ of Enquiry go in this Case.

Gardner *versus* Hobbs. Mich. 7 W. 3.

(3.)  
5 Mod. 76.

**T**HIS is an Action of Trespass, and the Defendant justifies by Virtue of the Stat. 43 Eliz. for the Poor's Rates, &c. the Plaintiff was nonsuited, but no Damages were found, therefore Counsel moved for a Writ of Error.

Harcourt *versus* Weekes.

(4.)  
5 Mod. 77.  
5 Mod. 118,  
119.

**W**hich was a Case of the same Nature as the former.

Vide 2 Salk.  
205, 206.  
1 Roll. Rep.  
272, 284.  
2 Roll. 212.  
1 Cro. 143,  
357, 446.  
Hard. 166.  
1 Sid. 380.

Holt C. J. We are of Opinion, that the Omission of the Jury to enquire of the Damages on a Nonsuit in Replevin, may be supplied by a Writ of Enquiry of Damages; it is true, the Jury might have been charged with the Damages, but since they are not, there may be a Writ of Enquiry awarded. 1 Cro. 143. Darrofe and Newbutt.

1 Vent. 40. Raym. 170. 1 Lev. 255. 1 Salk. 205, 206.

Prince *and* Moulton. Trin. 9 W. 3.

(5.)  
Com. 442,  
443.  
2 Salk. 663.  
2 Mod. 154.

**T**HE Plaintiff declares that 2 Julii Sexto Regni Regis he was possessed of a Close called the Meadow, and of another Close called the Pingle, and that the Defendant 3 Augusti Anno Sexto præd' a certain Water-Mill did erect, and the Foundation thereof ulterius solito did extend, by Reason whereof the Plaintiff lost the Use and Profit of his said Closes, from the said 2d of July Sexto. The Defendant pleads Not Guilty, and a Verdict for the Plaintiff, and entire Damages assessed. It was moved in Arrest of Judgment, that the Jury were inveigled to give Damages from the 2d of July, which was before the Mill was built. The Jury indeed might have helped it in their Verdict, but now it is too late. Hob. 189. Harbin and Green. Mo. 887. S. C.

Northy contra. One may lose the whole Year's Profits by an Overflowing in Harvest Time. Pasch. 4 Regni Regis, Hornor *versus* Bridges. Trespass tali die with a Continuando from a Day which was before, yet held good. So in an



Action for Words spoken at several Times, if the Words spoken at one of the Times were not actionable, but only in Aggravation, if entire Damages given, they shall be intended only for what is actionable. So Roll. 577. Goffe against Pangel.

Sir Barth. Shower pro Defendente. As to the Case Roll 577. the forbearing to exercise his Trade was held a good Consideration. Continuando's indeed are rejected, when impossible or inconsistent, because the Defendant is not bound to answer the Continuando; the Case of Syms and Gregory Allen 22. is answered by that of Hambleton and Veer, 2 Saund. 169. if a Man bring an Action in Michaelmas Term, for Words spoken in November, it might be said there to be impossible, and helped by Intendment, but always held ill.

Holt C. J. Where the Day is not material, as in Trespass, &c. if you lay a Day in the Declaration which is really after the Action brought, and before the Trial, the Judge of Nisi Prius will suffer you to give in Evidence any Day before the Action brought; but the Defendant may take Advantage of it in Arrest of Judgment. But if you lay a Day which is impossible, as the 30th of February, or a Day which is not come at the Time of the Trial, there you may likewise give in Evidence any Day before the Action brought, and there the Defendant shall never take Advantage of it in Arrest of Judgment; because the Court will intend that the Plaintiff must have given in Evidence a Time before the Trial, else he could not have had a Verdict, and the Fault in the Declaration is cured by the Verdict.

In the principal Case, it is true the Plaintiff might lose the Profits of the whole Year by an Overflowing in Harvest-Time; but here is the Word usum, which is impossible; and yet the Jury might compute according to the Declaration. I cannot distinguish it from the Case of Harbin and Green, S. C. 2 Mod. Hob. 189. 154.

Judgment arrested.

Savil *versus* Roberts. Trin. 9 W. 3.

**I**N this Case, Holt C. J. laid it down for a Rule, that (6.) there are three Sorts of Damages, either of which was Carthew 416. a sufficient Foundation for an Action. 1. Where a Man suffers Damage in his Fame and Credit. 2. Where any Damage is done to his Person, as by Imprisonment, Battery, &c. for that respects his Liberty. 3. Where a Person suffers

suffers any Damage in his Property. And therefore though the Plaintiff here had not suffered Damage in his Fame, or in his Person, yet he having received Damage in his Property, he held it actionable. See Conspiracy.

Dove *versus* Smith. Pasch. 3 Ann.

(7.)  
Mod. Caf.  
153.

**T**RESPASS for breaking the Plaintiff's Close, and treading down his Grass; it appeared on the Evidence, that the Defendant sometimes used to set a Table in the said Close, and that he often walked in it with others, who shot with Bows and Arrows there.

Lutw. 1301,  
1304, &c.

Holt C. J. Evidence must be given of the Value of the Damages done, or you cannot recover. And if in this Case the Jury give under 40 s. Damages, though the Title of the Land doth not come in Question, I will certify for Costs; for this is a voluntary malicious Trespass, and the Statute 22 & 23 Car. 2. is only to be understood of small accidental Trespasses. And it being here upon a Plea of Not Guilty, the Defendant could not give any Matter of Right in Evidence, even in Mitigation of Damages.

Osborne *versus* Hosier. Pasch. 3 Ann.

(8.)  
6 Mod. 167.  
6 Mod. 184.

**D**EBT upon a single Bill, for Payment of 230 l. on Demand, upon Non est factum, one of the subscribing Witnesses gave full Evidence of the Ensealing and Delivery of the Bond. On the other Side, a Person of the same Name and Surname with the other subscribing Witness, acknowledged that the Hand was very like his, but it was not his; that he never knew either of the Parties, nor the other Witness, nor could the other Witness say he was the Man; and both their Reputations being made good in Proof, Holt C. J. ordered them both to write their Names, and thereupon left it to the Jury, who found for the Plaintiff.

And Holt C. J. ruled, that this being a single Bill, it needed no Specification according to the late Statute, because it did not carry Interest; yet directed the Jury to give Damages, viz. Interest. And where it was objected, It was payable on Demand, and no Damages or Interest incurred till Demand, and none was proved.

Holt C. J. said, They could not take Advantage of that upon Non est factum, but should have pleaded it.

## D A Y.

*Sir Robert Howard's Case.* Trin. 11 W. 3.

**A** Policy of Assurance to insure the Life of Sir Robert Howard for one Year, from the Day of the Date, was dated the 3d of September 1697. Sir Robert died on the 3d of September 1698, about one o' Clock in the Morning.

2 Salk. 625.  
2 Salk. 413.  
3 Lev. 438.  
5 Co. 1, 94.  
100.  
2 Bull. 83,  
305.

Holt C. J. ruled at the Sittings, 1st, That from the Day of the Date, excludes the Day, but from the Date includes it. 2dly, That the Law makes no Fraction in a Day, yet in this Case, he dying after the Commencement, and before the End of the last Day, the Insurer is liable, because the Insurance is for a Year, and the Year is not compleat 'till the Day be over.

## Death of Persons.

*Holman versus Exton.* 4 W. & M.

**A** Lease was made in Reversion to L. D. for 99 Years, to commence after the Death, or other sooner Determination of the Estates of J. D. the Father, and J. D. the Son, who had then a Lease in Possession for the like Term, if they or either of them so long lived. The Death of J. D. the Son was positively proved, but as to the Father, Proof was that he was reputed dead, and had not been heard of in fifteen Years.

Carthew  
246.

Holt C. J. Upon the Perusal of the Statute 19 Car. 2. 19 Car. 2. by which it is enacted, That if any Persons, for whose Lives Estates are granted, absent themselves seven Years together, and no evident Proof is made of their Lives, in any Action commenced by the Lessors or Reversioners for Recovery of the Tenements, they shall be accounted as dead; I am of Opinion that this Case is within that Statute, because

c. 6.



cause L. D. the Lessor of the Plaintiff in Ejectment had a Term in Reversion in the Lands, and so was a Reversioner within the very Letter of the Statute; and the Defendant not being able to prove that J. D. the Father was alive, at any Time within seven Years last past,  
Therefore the Plaintiff had a Verdict and Judgment.

## D E B T.

Brookes *versus* Cooke. Mich. 1 W. & M.

(1.)  
1 Show. 57.

**D**EBT upon an Escape against the Marshal, setting forth a Judgment recovered by her as Executrix, and the Party in Execution, and let at large; fresh Pursuit pleaded; Verdict for the Plaintiff. Moved in Arrest of Judgment, that the Plaintiff had brought the Action in the Debt and Detinet in her own Right, whereas the Recovery, which is the Foundation of the Action, was as Executrix.

Holt C. J. Where an Executor brings an Action in the Debt, where he ought not, it is helped by the Statute; but the Quare is, Whether this Action be brought as Executor, or in her own Right? If this be so, and remains uncertain, it will remain uncertain still whether this Judgment be in her own Right or not. In Trover, or Trespass, if it appears the Wrong was in her own Time, though she be called Executrix in the Declaration, yet it might be in her own Right; so here it appears uncertain.

Dolben J. If Executor brings Debt, and recovers, and then an Escape of the Party, the Suit for the Escape must be as Executor, and so it is agreed in Holman and Chute's Case. 2 Cro. 685.

Per Cur' Judgment was arrested.

Anonymus. Mich. 5 W. & M.

(2.)  
Cases W. 3.  
48.

**D**EBT on Judgment in B. R. Plea in Abatement quod adhuc respondere non debet, because of a Writ of Error depending in Cam' Scacc'. Plaintiff demurred.

Holt C. J. It is strange, that a Writ of Error should supersede an Execution by one Plea, and yet allow a Man to come at it by another. There was no Remedy at Common Law for Debt or Damages, where a Plea had passed after Judgment, but by Action of Debt, till the Statute of W. 2. gave a Sci' fac' after the Plea; and it is resolved Yelv. 29. that an Executor could not plead a Judgment against his Testator, after Error brought in Bar of a Sci' fac' upon a Statute, because it was doubtful whether it should be affirmed or not. But I will be bound by constant Resolutions of this Court, which are, that this is no Plea in Bar or Abatement; it is true, there have been some Resolutions to the contrary in the Exchequer, and Judgments have been reversed there, in my Lord North's Time for this Error, and in Chief Baron Turner's Time, and particularly in the Case of Danvers and Smith; but that was a new Notion. Dolben and Eyres acc' (absente Gregory.) Eyres cited Mod. 121. and they all agreed there was no Difference between its being pleaded in Abatement and in Bar, per totam Curiam.

Grandvill and Dighton. Mich. 5 W. & M.

**D**E B T upon a Judgment in B. R. the Defendant (3.) pleaded in Abatement of the Action, a Writ of Error Skin. 388. pending upon this Judgment in Cam' Scacc'; the Plaintiff demurred; adjudged for the Plaintiff. Sid. 236. 4 H. 6. 31. and 18 E. 4. 6. there cited to be so resolved. And a Case was cited per Dolben to be adjudged accordingly in the Time of Rolle, and after affirmed in Parliament before all the Judges of England, between Limerick and ———; and though it had been stuck at, and Vaughan questioned it, yet it had been oftentimes so ruled; and it was held in the Case of Danvers and Smith in the Exchequer-Chamber, that such Plea is not good in Bar, but good in Abatement; but this Difference was not thought reasonable.

And Holt C. J. said, If it were not for the Current of Authorities eontra, it seemed hard to him that such an Action lies; for the Writ of Error is a Superfedeas to an Execution, and therefore pari ratione it ought to be a Superfedeas to all the Ways to come at an Execution; and he cited the Case of Read and Bearblock, where a Man pays a Security of an inferior Nature, pending a Writ of Error, upon a Judgment on a Security of a higher Nature; this

was not a Devastavit, which shews that the Writ of Error had so totally suspended the Effect of the Judgment, that it shall not have any Regard or Essence, but this notwithstanding, it was, though with some Reluctance, adjudged by him and all the Court, ut supra.

Rowley *and* Raphson. Mich. 7 W. 3.

(4.)  
Skin. 590.

**I**N Debt upon a Judgment in B. R. the Defendant pleaded, that after the Judgment a Writ of Error was brought in Cam. Scac. directed to the Chief Justice of B. R. upon which the Cause was removed before the Judges there, where it yet remains undetermined, and prayed Judgment if he shall be compelled to answer quousque the Cause be determined there; the Plaintiff demurred; and adjudged that the Defendant answer over: For this is not a Plea either in Bar or in Abatement; and such a Conclusion quousque is not good.

And Holt C. J. said, that this might be pleaded in Abatement, but not in Bar; for though the Plaintiff has commenced his Action too soon, it is not a Reason why he should be barred, though it may why the Suit should be abated.

Evans *versus* Powel. Trin. 8 W. 3.

(5.)  
Com. 377,  
378.

**D**EBT upon an Obligation of 2800 l. the Condition was for Payment of 1400 l. with Interest, on such a Day, according to the Intent of a certain Proviso or Covenant mentioned in an Indenture bearing even Date, &c. made between the same Parties. The Defendant recites a Deed of the same Date made between the Plaintiff and Defendant, whereby in Consideration of 1400 l. secured to be paid by an Obligation of the same Date, and in Consideration of 5 s. paid to Sir S—— E——, Sir S—— assigned to the Defendant a twentieth Share of Lead-Works in C——, and saith he hath paid the Money secundum formam provision in Indentura præd<sup>a</sup> mentionat<sup>a</sup>. The Plaintiff replies, that the Defendant did not pay the Money, &c. Verdicta pro Quer<sup>t</sup>.

Lloyd moved in Arrest of Judgment, that the Defendant hath mistaken the Deed, for there is no such Covenant in the Deed set forth, therefore it is a void Issue, and there-  
fore



foze there ought to be a Repleader; and to that Opinion the Court inclined.

Then Holt said, the Defendant is estopped to say there is no such Deed, therefore he should set forth such a Deed, else he is gone, and must pay the Money. He might have pleaded Payment secundum formam conditionis, and well; for the Indenture is but a further Description of the Agreement.

Afterwards Holt C. J. said, The Defendant hath recited as much of the Deed as he thought fit, yet there might be such a Covenant in the other Part.

1st, The Defendant is estopped to say, there is no such Indenture.

2dly, He says he hath paid it according to the Proviso and Covenant in that Indenture.

Lloyd. What if we set out the whole Indenture, and there is no such Covenant?

Holt C. J. 'Tis your Fault then to say so in the Condition.

Judicium pro Quer' (cæteris tacentibus.)

*Bellasis versus Burbrick.* Mich. 8 W. 3.

By Holt & Cur'. **I**N Action of Debt for Rent due upon a Lease at Will, the Plaintiff must shew an Occupation; for the Rent is due only in respect thereof, and therefore it must appear to the Court when the Lessee entered, and how long he occupied; but in Debt for Rent on a Lease for Years, the Plaintiff need not set forth any Entry or Occupation, for though the Defendant neither enters nor occupies, he must pay the Rent, it being due by the Lease or Contract. (6.)  
1 Salk. 209.  
1 Vent. 41,  
408.  
1 Mod. 3.  
1 Sid. 423.  
4 Leon. 18.

*Badger versus Flويد.* Pasch. 12 W. 3.

**T**HE Plaintiff had Judgment in Ejectment, Error was brought, and Writ given to prosecute, and answer the mean Profits, and pending it, the Plaintiff brought Debt for Rent. (7.)  
Cases W. 3.  
398.

Per Cur'. The Writ of Error does not hinder the Plaintiff from bringing Debt, or distraining; here he might have entered without a Writ of Execution. In a real Action, after Judgment, the Plaintiff may enter notwithstanding Writ

Writ of Error, if his Entry were lawful without the Judgment; for the Judgment shall not put him in a worse Condition than he was in before. And whereas it was urged, that in the Exchequer they had laid a Plaintiff by the heels for such a Thing; Holt C. J. said, it must be by Virtue of their equitable Power, which this Court had not.

Grips *versus* Ingledew. Mich. 1 Ann.

(8.)  
Farrell. 87,  
89, 90, 91.

THE Defendant had agreed to pay the Plaintiff 35 l. for every hundred Stacks of Wood in such a Place, and so for as many more as should be felled 'till Michaelmas following: And the Plaintiff declared for so much Money as eight hundred Stacks would come to at that Rate, and also for some odd Stacks, in Proportion to the Rate of 35 l. per Hundred. To this Declaration there was a Demurrer, because he declared for more than the Articles of Agreement entitled him to, as there was no Agreement for any Thing under 100 Stacks.

Holt C. J. In the Action here brought the Demand is entire, but it is not so in the original Foundation of it, for that is several; and this Difference is made, if there be a certain stated Sum specified in the Deed itself, that should not be abridged by any Remittitur or Release of the Plaintiff, if he declares upon that Deed: As if a Man bring Debt upon a Bond of 30 l. and declare on a Bond of 20 l. this is ill, because he has brought his Action for more than his Due; and this rests upon the Deed only, and the Sum in it does not amount to the Demand; but if an Action be brought upon a Deed which refers to a Matter of Fact, that makes the Duty more or less; and then if the Fact which is referred to, entitles the Plaintiff to a less Sum only, and he demands more than that Fact which the Deed refers to upon Computation will entitle him, there if he remits so much of his Demand as the Fact does not make out, it will be well, and he shall have Judgment for the Rest, for that Fact which is not made out, is not contradicted by the Deed: And so it had been adjudged upon a Verdict, and there is no Diversity between a Demurrer and Verdict. And he afterwards said, that this was a Debt indeed arising by Deed, but not a stated Debt in the Deed itself.

Judgment for the Plaintiff, releasing the Overplus.

1 Roll. Abr.  
785.  
Style 175.  
Cumberba.  
365.

Hackett *versus* Tilley. Hill. 4 Ann.

**T**HE Plaintiff, as Administrator to Fox, brought Debt upon a Bond made to the Intestate; the Defendant prays Oyer of the Condition, which was to save harmless the said Fox, his Executors and Administrators, from all Actions that are already brought against the said Fox for any Escapes within two Years; and then the Defendant pleads that he did save him harmless from all Actions of Escape. The Plaintiff replies, that one Hind was committed in Execution to the said Fox, and he was in Custody of the Defendant; whereupon the Plaintiff in that Action brought Debt upon Escape against the said Fox the Intestate, and had Judgment Term Pasch. and so recovered against the Intestate 200 l. which he was forced to pay. And note here, that the Bond was dated after the Easter Term, wherein the Judgment was obtained against Fox, so that the Bond was subsequent to the Judgment. The Defendant rejoins, that Fox did suffer the said Hind to escape; absque hoc, that the Defendant did suffer him to escape; to which the Plaintiff demurs, being a Departure, as he alledges.

(9.)  
A Covenant to indemnify from all Actions brought, shall extend to Actions whereon Judgment was had before.

Hackett *Administrator of Fox versus* Tilley. Mich. 5 Ann.

**T**HE Defendant pleads, that Fox was not damaged by an Action of Escape, and 'twas argued by Serjeant Parker for the Plaintiff, and Serjeant Broderick for the Defendant.

(10.)

Parker: I need not say that the Rejoinder is a Departure, for that, I believe, will not be maintained, for I think the Court were of that Opinion when this Case was argued before; so there remain two Objections, first, Whether the Condition of the Bond is against Law? 2dly, There being a Judgment against Fox before Tilley gave his Bond, whether the Defendant was to save harmless against this Judgment, by Force of these Words (Actions already brought) in the Condition? And as to the first, I think the Case of Morton and Symmes, Hob. 12, 14. rules our Case, for there the High-Sheriff had such a Condition against an Under-Sheriff, and it was ruled to be good; and in 1 Leon.



73. it is ruled there, that no Condition shall be held to be against Law, unless it appears to be against Law in the very Condition in terminis terminantibus, though I have no Occasion to carry this Case so far; but this is a lawful Condition before, though the Escapes were suffered before the Bond was made, so is 1 Saund. 161. Lutw. 143. so that I think it is not to be doubted but such Condition is good. To the second Point, All Actions, that are already brought, are in the *preter-perfect* Tense, so that though there was a Judgment before the Bond was given, yet the Judgment was upon an Action of Escape which was already brought, and so within these Words, and the Meaning of the Condition; besides, by the Condition he has two Years to indemnify Fox, within which Time an Action may be brought, and Judgment and Execution obtained thereon, so it would be very mischievous if such a Construction should be, viz. that he should indemnify Fox from Actions only, for that would be to construe the Words contrary to the Intent of the Parties, and which appears on the Face of the Condition, and the two Years given to Tilly, was to repay us; besides, it appears that Fox brought a Writ of Error by the Advice of Tilly on the Judgment obtained on the Escape of Hind.

Broderick for the Defendant said, that the Rejoinder is no Departure, for the Condition is to save Fox harmless from all Actions on Escapes suffered by Tilly, and the Rejoinder is, that Fox did permit him voluntarily to escape, and so does not vary from the Bar, but may stand well with it; nor does it appear that Hind was ever lawfully in Execution, because it is said only that he was a Prisoner sub custodia of Fox, and so perhaps not lawfully in Execution. Suppose Fox had been indicted for a voluntary Escape of his own, that would not affect us: And he cited several Cases wherein it was said that such Conditions were against the Law. Yelv. 197. 3 Cro. 230. 3 Leo. 236. and Conditions against Law are void, as well as Assumpsits against Law.

As to the second Point, Actions which are already brought cannot be intended a Judgment, and Conditions are to be construed favourably for the Obligor, and is quasi a Defence to him, Dyer 17 pl. 96. Lastly, he said, the Rejoinder is no Departure; for when ever you shew new Matter in the Replication, I may answer the same by new Matter in my Rejoinder. Moor 186. N. 333.

Parker replies; If you say in your Plea, you saved me harmless, you shall not be afterwards admitted to say, that you should not save me harmless. I do not deny, but if new Matter be assigned in the Replication, you may shew new Matter in your Rejoinder, but still you are not to depart from your Bar.

Holt C. J. If a Condition be to save one harmless from all Actions pending, you may plead there are no Actions pending, being general; but if the Condition be to save you from a certain Action pending, there you are estopped to say that such an Action is not pending, being particular. It is a good Condition, to save me harmless from all the ill Things I have done, for that is no Encouragement for me to do any more ill Actions; but you are not to save me harmless from all the ill Actions which I shall do, for that is an Encouragement to me to do ill Things, which is against the Law. But the Condition here is clearly good for another Reason, Fox was Warden of the Fleet, and he will not admit Tilly to be his Deputy, unless he will indemnify him from such Escapes as were permitted by him before; but as to the last Point, I am not very clear that this Breach is well assigned, for the Bond is to save him harmless from all Actions already brought, now there was no Action when the Bond was made, there being a Judgment, then the Action was gone, quia transivit in rem Judicatam.

Powell J. Surely the Rejoinder is a Departure, for the last Reason; the Bond given by Tilly is to save harmless from all Actions already brought, sure the Judgment was an Action already brought. It is true, the Action is gone and extinguished in Law by the Judgment, but yet surely Fox was damnified by an Action, or at least by the Effect of an Action already brought.

Holt C. J. The Prejudice now is by the Judgment, not by the Action.

Powell J. It is true; but here are two Years given to the Defendant to indemnify Fox, and in that Time there might be a Judgment and an Execution upon an Action, and therefore it should be intended that the Defendant might have two Years Time for the Payment of the Money, and Conditions are to be construed according to the Intent of the Parties: To which Powis accords for the same Reason; & adjournatur.

Hackett *versus* Tilly. Hill. 5 Ann.

(II.) **N**OTE in this Case, that the Bond was dated the 26th of May, and the next Day the first Plaintiff Fox gave the Defendant Notice of the Escape of Hynd, and in Easter Term the same Year 1695, Judgment was had against Fox. The Defendant pleaded that he did keep him harmless from all Actions of Escape quæ tunc præantea prosecutæ fuerunt.

Sir James Montague for the Plaintiff; This is within the Intent of the Condition, because a Judgment is the Consequence of the Action; for no Man can be prejudiced by the Action, but by the Judgment, Action & loyal demand de son droit; if so, then a Judgment is also a Demand of it, but here it does not appear that this Judgment was before the Bond was executed; first, because the Judgment was in a variable Term. It is true, the Court will in some Cases judicially take Notice of the Beginning and Returns of the Terms, but that is when it is directly the Point in Question, as a Writ of Error grounded upon a Return, &c. but not so when it comes before them collaterally in collateral Actions. So the Difference 1 Ro. 525. 8, 12, 14. 1 Cro. 275, 276. Dyer 182. a. b. Where if Issue be taken in such a Matter, it shall be tried by the Almanack, which cannot be, because the Almanacks are no Part of the Law, as we all know; so that all this depending upon a Supposition, whether the Judgment was before or after the Perfection of the Bond, the Court will not judicially take Notice of the Term as Judges, so as to defeat this Bond, and the Intention of it. Besides, it is only by Relation a Judgment of the first Day of Easter Term, and that is fictio juris quod nulli facit injuriam; for in Truth the Action was pending when the Bond was sealed; also the Defendant in his Plea took it to be so, for he pleads that he did save him harmless from all Actions quæ tunc præantea prosecutæ fuerunt, so that if he had meant all Actions pending, he should have pleaded otherwise, for he says he did save us harmless from all Actions which have been already brought, so that must be the Time past; therefore pray Judgment for the Plaintiff.

Eyre for the Defendant; I did not think that it would now be contested that the Kalendar is not Part of the Common Law, being settled so in the Case of Dervy & al. in this Court, and also in the Case of Harvy and Broade; the



Question, which the Court directed to speak to, was, Whether we were by the Condition of this Bond to save them harmless from the Judgment, which was obtained before this Bond was executed, and I hope not, because we were to save them harmless from all Actions already brought; now by the Judgment the Action is gone, even an Obligation is gone by a Judgment. *Higgin's Case* 6 Rep. And the Words in the Condition, viz. All Actions that are already brought, are restrictive, and shew the Intent of the Parties to restrain it, so not to be extended to Actions that are already brought, for he may have several Ways to defeat Actions brought, before Judgment is obtained upon them, but not from Judgments, because there is no Fence against that but Payment of the Money. As to the Words of our Plea, that signifies nothing, because it is putting the Words of the Condition into Latin, and though the Words are in the preter-perfect Tense, yet that will not alter the Condition; for the Action must have been brought for which the Plaintiff was to sue, that is, in the Time past; yet it follows not that if Judgment were had before the Bond was executed, that this may be included within the Words Actions already brought.

Holt C. J. To save you harmless from all Actions, was to save you harmless, so as the Action should not come to a Judgment. I see no Difference between moveable and unmoveable Terms, for the Kalendar is Part of the Law, being established by Act of Parliament, and so Part of our Law, for which Reason we shall take Notice of it; it is Nonsense to say that there should be an Issue tried by Almanack, as you would make the Case in *Dyer* 182.

Powell J. I cannot alter the Opinion I was of last Time for the Plaintiff, though I have considered it; for the Defendant has two Years to save the Plaintiff harmless, and in that Time all the Actions pending, as they would have it, would become Judgments; so that the Condition would become frivolous, or would defeat the Bond, and make it signify nothing.

Holt C. J. It is true, he has two Years to save them harmless from the Action; but if Judgment is against the Plaintiff, the Obligation is not forfeited; as if I am bound to save you harmless from a Bond, if the Bond is suffered by me to be forfeited, my Bond is forfeited; but if I am bound to save you harmless from a Bond forfeited, then I am to save you from having a Judgment against you.

Powis J. I think the Plaintiff should recover, because the Words of the Condition are in the preter-perfect Tense.

Gold J. It is a Cause deserves Consideration; but I must confess that my Opinion is that the Plaintiff should recover.

Holt C. J. If you are clear, we may give Judgment for the Plaintiff. But they desired Time to consider.

Holt C. J. Suppose the Judgment was had a Year before the Bond was executed.

Powell J. Perhaps that might alter the Case.

Holt C. J. Prosecut' sunt, & prosecut' fuerunt, I think are much the same Thing.

*Annesly versus Cutter.* Hill. 5 Ann.

( 12. ) **D**E B T upon a Bond with Condition to perform Articles, the Articles were, that the Defendant Cutter should educate, keep, maintain and provide for J. Cutter his Son in one of the Universities of this Kingdom, until he had passed all his Degrees, and was a Master of Arts in one of the said Universities; and when he became Master of Arts, as aforesaid, then the Plaintiff was to pay so much to the Defendant for his said Son's Use. The Defendant pleads that he did educate his Son at D. and afterwards that he was fit for the University, and that afterwards he did keep, maintain and provide for the said J. Cutter, until he had passed all the Degrees that were requisite to fit him to be Master of Arts at the University of Cambridge, and postea such a Day he became Master of Arts at Cambridge aforesaid. The Plaintiff demurs.

Debt upon a Bond to perform Articles; and on a Demurrer the Question was necessary in a Plea, that the Defendant educated the Plaintiff's Son in the University, and that he passed all his Degrees, to shew what Degrees were necessary to be passed, &c.

Serjeant Pratt shewed two Causes, first, because he does not tell what these Degrees were, for perhaps he did not pass all the Degrees which were requisite, and we might have taken Issue thereon, if there had been other Degrees requisite, which were not alledged, to fit him to be Master of Arts; besides, we might say he did not take such a Degree, for that was issuable; for a Plea should comprehend a competent Certainty, on which an Issue might be taken: It is true, we might in our Replication say that he did not take such or such a Degree, but then we should lose the Advantage the Law gives us, upon his Averment of no more Degrees to be requisite, except those by him before alledged. The second Exception was, that he says that he did keep, maintain and provide for him, until he passed all the De-

grees

gress which were requisite to fit J. Cutter to be Master of Arts, and postea such a Day he became Master of Arts. Now the Degree to fit him to be Master of Arts, is Bachelor of Arts, and that Degree they take commonly three Years before they become Master of Arts, and who maintained him these three Years non constat by the Plea.

Broderick for the Defendant; As to the first, the Plea is good; for if the Condition is to perform Covenants, and the Covenants are in the Affirmative, performavit omnia is a good Plea; and the Difference when the Plea is in the Words of the Condition, and when not, is this; if there be any Matter of Law, &c. to be done that is under the Jurisdiction, and for the Judgment of the Court, there you must particularly shew the Performance, and the Pleading in the Words of the Condition is not good; as if I am bound to make you a sufficient Release, there it is no good Plea for you to say, you made a sufficient Release, but you must shew it in particular, that the Court may judge of the Validity thereof: So is the Reason of Specott's Case, 5 C. 57. Schismaticus Inveteratus was not sufficient, being too general, ergo uncertain for the Court to judge. But where the Condition is to do Facts merely, the Record is not to be swelled up therewith, and if there be Occasion, you may assign a Breach. 3 Bulst. 31. 1 Ro. Rep. 173. So if the Condition be a Thing which is out of the Jurisdiction of the Court, or is to undergo an aliud Examen, there Pleading in the Words of the Condition is good. Vide 3 Mod. 69, 70. As to the second, I hope that is no Fault, for we did maintain him in all his Degrees requisite, and he is now a Master of Arts. The Court did unanimously agree the Plea to be bad, because he does not shew who maintained him from the Time he commenced Bachelor, until he became Master of Arts.

And Holt C. J. said, It was well enough as to the first Exception, and if it had any Fault, it was a Default of Form helped by the general Demurrer. The rest of the Judges said nothing to the first Exception; for the second Exception the Plaintiff had Judgment Nisi.

Mawgridge *versus* Saull. Pasch. 8 Ann.

**A**N Action of Debt on Bond; upon Oyer craved, it appeared to be thus: Thomas Mawgridge, this is to authorize you to seize and sell so much as will satisfy a Debt  
of



of 9l. 16s. 6d. which I do acknowledge to owe to you Thomas Mawgridge, and to return the Overplus; and this shall be your Discharge for so doing. In Witness, &c.

After a Verdict for the Plaintiff, Mr. Whitaker moved in Arrest of Judgment, that though this seems to be an Acknowledgment of a Debt, yet it is but an Authority. 42 E. 3. 9.

Holt C. J. If a Man, by Writing under his Hand and Seal, acknowledge himself to be indebted to J. S. in 1000 l. that is an Obligation.

Serjeant Hall; Dyer 210. it is said, that if A. by Will acknowledge to have found so much of B.'s Money, Debt will lie. Kelw. 34. There it is debee to B. so much; and 1 Vent. I acknowledge to owe 20 l. in all these Cases adjudged that the Action lies.

By the whole Court, Judgment for the Plaintiff.

## D E C E I T.

*Medina versus Stoughton.* Trin. 12 W. 3.

1 Salk. 210,  
411.  
1 Show. 68.

**A**ction of the Case, for that the Defendant, being possessed of a certain Lottery Ticket, sold it to the Plaintiff, affirming it to be his own, when in Truth it was not his, but another's. The Defendant pleaded he bought it bona fide, and so sold it; and prayed Judgment of the Declaration, &c. The Plaintiff demurred.

Style 343.  
2 Cro. 474.  
Moor 196.  
3 Mod. 281.

Holt C. J. If a Man having Possession of Goods sell them as his own, an Action lies for the Deceit; and where one, who has the Possession of any personal Chattel, sells it, the bare Affirming it to be his amounts to a Warranty, and Action lieth on the Affirmation; for his having Possession is a Colour of Title, and perhaps no other Title can be made. 'Tis otherwise where the Seller is out of Possession, for there may be Room to question the Seller's Title; and Caveat Emptor in such Case. And so it is in the Case of Lands, whether the Seller be in or out of Possession; for such Seller cannot have them without a Title, and the Buyer is at his Peril to see it.

Judgment to answer over.

# DECLARATIONS.

Lewis *versus* Weeks. Mich. 1 W. & M.

**I**N an Action of Debt upon a Judgment in a Hundred Court; the Plaintiff declared, that such a Day at W. in the County of S. at the Court of the Hundred of N. before the Suitors of the said Court, then and there held, he recovered against the Defendant, &c. whereof he was convicted, &c. and that the said Judgment was in full Force, by which an Action accrued, &c. On Nil debet pleaded, the Parties were at Issue, and there was a Verdict for the Plaintiff; and now the Defendant moved in Arrest of Judgment, that the Declaration was too general, because where the Plaintiff recovers in a Court not of Record, as in this Case, the Declaration ought to be special, setting forth all the Proceedings in certain.

(1.)  
Carthw 85,  
86.

Holt C. J. I never knew any good Reason for any Distinction in declaring on a Judgment had in a Court of Record, and in a Court not of Record; it is true, a Distinction hath been made, but without any Authority for it. Though in this Case he held, that the Declaration was too general and concise; for the Plaintiff at least ought to have set forth the Names of the Suitors, who were the Judges. It was at last adjudged, that these Defects were cured by the Verdict; and that it shall be intended all this Matter was given in Evidence at the Trial.

Yelv. 16, 17.

Judgment for the Plaintiff.

Wyat *versus* Aland. Trin. 2 Ann.

**I**N an Action Qui tam it was objected, that the Declaration was nonsensical and impossible, and the Statute of Jeofails would not help it; but the Counsel for the Plaintiff urged, that the Nonsense should be rejected, and then the Declaration would be sufficient.

(2.)  
1 Salk. 324.

Holt C. J. Where a Matter set forth is grammatically right, and absurd in the Sense, we cannot reject some Words to make Sense of the Rest, but must take them as they are; for there is nothing so absurd or nonsensical, but what by rejecting and omitting may be made Sense. But where a

H h h

Matter

2 Cro. 349.  
1 Mod. 42.  
2 Saund. 96.

Hatter is Nonsense by being contradictory and repugnant to something precedent, there the precedent Hatter which is Sense shall not be defeated by the Repugnancy which follows, but that which is contradictory shall be rejected; as in Ejectment, if the Declaration be of a Demise the Second of January, and that the Defendant afterwards, that is to say, the first of January ejected him; here the Scilicet may be rejected, as being expressly contrary to the Postea, and the Hatter precedent. He also held, where a Hatter is capable of different Meanings, that shall be taken which will support the Declaration or Agreement; and not the other which would defeat it.

Powel J. was of Opinion, that Words unnecessary might in Construction be omitted or rejected, though they are not repugnant or contradictory. It was adjourned.

## D E E D S.

Salter *versus* Kidgley. Trin. 1 W. & M.

(1.)  
Carthew  
76, 77.  
1 Show. 58,  
59.

**C**ovenant, on a Deed between the Plaintiff and another Person, for letting a House or Tenement, under a certain Rent; then the Defendant, who was no Party to the Deed, covenants for himself, &c. on the Behalf of the other, that he shall pay the Rent, and perform the Covenants, &c. And it was argued on a Demurrer for the Defendant, that he was not bound by this Covenant in the Deed.

40 Ed. 3. 5.  
Fitz. Oblig.  
16.  
F. N. B. 146.  
3 Cro. 995.

For the Plaintiff it was said, That the Deed here was in Nature of two Deeds upon one and the same Piece of Parchment, which might very well be; and therefore the Defendant shall be obliged by it: And if the Deed is taken as a Deed of the first Person and a Stranger, he shall certainly be bound by such Deed; so whether a Deed be Poll or Indented, if there be a Covenant by another Man, and he seals it, he is bound.

1 Inst. 52.  
Reg. 165.

Holt C. J. Why cannot a Man oblige himself by Deed, if there be express Words for it, and the Deed is sealed by him? In a Deed of Feoffment, a Letter of Attorney to A. not a Party, is good now, though formerly held to be otherwise;



therwise; and this is by Indenture. And he made a Distinction in this Case, that one Party to a Deed could not covenant with another who was no Party, but a mere Stranger to it; but one, who is not a Party to a Deed, may covenant with another that is a Party, and thereby be bound by sealing the Deed.

Per Cur. The Action lies against the Defendant.

Baker *versus* Lane. Pasch. 4 W. & M.

By Holt C. J. **I**F Tenant for Life grant his Estate to him in Reversion, and this Deed be pleaded (2.) as a Grant, it is ill Pleading; for it ought to be pleaded as a Surrender, according to the Operation of Law. And every Deed should be pleaded according to the Effect which it has in Law, and not according to the Words, for it would be uncertain and barbarous Pleading. Then to plead this Deed as a Covenant to stand seised, is to make the Deed of another Nature, than to plead it as a Grant; because by Grant the Estate passes, and the Grantee is in *en le Per*; but in a Covenant to stand seised, the Use only passes from the Party, and the Estate is executed out of him by the Statute: And here to plead the Deed generally, and leave it to the Court, is to introduce Uncertainty. But for that in Fox's Case in the 8 Report, the Deed is pleaded by the Words of Demise, set and to Farm let, the which are Words of Common Law Conveyance, yet the Court upon the whole Pleading adjudged it to be a Bargain and Sale; upon this *Curia advisare vult*. S Rep. 93, 94. Skin. 315, 316.

Anonymus. Pasch. 9 W. 3.

**I**T is here alledged, that when a Defendant pleads the Plaintiff's Deed not in Court, it should be produced under the Hand and Seal of the Plaintiff, and where it was made, and the Substance thereof, that if it should be mis-recited, or a wrong Deed set forth, the Plaintiff might plead *Non est factum*. (3.) 3 Salk. 119.

Holt C. J. When a Deed is pleaded with a *Profert hic in Curia*, the very Deed itself is by Intendment of Law immediately in the Possession of the Court; and therefore when Oyer is craved, it is of the Court, and not of the Party. After Oyer craved, the Deed is become Parcel of the Re- Sid. 308.

cord, and the Court must judge upon the whole; and the Demand of Oyer is a Kind of Plea, and may be counter-pleaded. The Words *ei legitur in hæc verba*, &c. are the Act of the Court.

Trin. 1 Ann.  
Farrell. 38.

Holt C. J. If a Deed has no Date, or an impossible Date, the Plaintiff may declare, that the Defendant, by his Deed on such a Day and Year, did such a Thing, and upon Oyer there will be no Variance; but if you say, that the Defendant by his Deed of such a Date, or bearing Date so and so, and on Oyer the Deed has no Date or an impossible one, it will be Variance.

Armote *versus* Bream. Mich. 3 Ann.

(+)  
Mod. Caf.  
244.  
2 Salk. 498.  
1 Salk. 76.

**I**N Debt upon Bond for Performance of an Award, No Award was pleaded; and a Deed of Award set forth, but it did not appear what the Date of it was; on which there was a Demurrer, and Exceptions were taken to it.

Holt C. J. Where a Man has obliged himself to make a Deed, and is sued for not doing it, it is not enough to say, that he made the Deed, Bond, &c. but he must set it forth, that the Court may judge of its Sufficiency, for it ought to be a good Deed: But if it be to deliver, or shew, or produce a Deed that is already made, there it is sufficient to say, that he delivered, or shewed, or produced the Deed. And in this Case, it was alledged to have been made on such a Day, which appeared to be within the Time for doing it; and if no Date be shewn, it shall be intended it had none, and then it is good from the Delivery. Every Writing or Deed has a Date in Law, viz. the Time of Delivery thereof; and a Deed may bear Date one Day, and be delivered on another; so that here the Day of Delivery is the Date, and the other the bearing Date. And in the making a Deed or Writing, that which gives it Essence and Being is the Date of it.

5 Rep. 1, 78.  
Cro. Eliz.  
472.

3 Salk. 120.

Per Holt C. J. A Date of a Deed is either express or implied; the express Date is the very Day and Year in which the Deed is made, and this is always intended, when in pleading it is said bearing Date; the other, which is the implied Date, is the Delivery.

*Bushel versus Pasmore.* Trin. 3 Ann.

**D**EBT on a Bond, the Defendant pleads, that the Bond was delivered as an Escrow to a third Person, to be his Deed to the Plaintiff, upon his vacating a certain Judgment, which was not done; and so Non est factum, &c. (5.) Mod. Caf. 217, 218.

Holt C. J. held, that there is no Difference between delivering a Deed as an Escrow, to become the Party's Deed on his doing a certain Thing, and to be delivered to the Party as his Deed, upon his performing such a Thing; for in either Case, it is not his Deed 'till the second Delivery. And if a Man delivers a Writing as his Deed to a Stranger, to be delivered by him to a third Person, on doing such a Thing, that is a Deed ab initio in Trust for the third Person, upon a Contingency. And he said, that all these special Non est factums in Cases of Escrow, &c. are impertinent, for thereby the Defendant brings all the Proof upon himself; whereas if he pleaded Non est factum generally, he would turn the Proof of whatever is necessary to make it his Deed upon the Plaintiff. And it was by all agreed, that the Deed cannot be an Escrow to the Party himself. 3 Keb. 140, 142. Savil 71.

*Fitch versus Wells.* Hill. 4 Ann.

**T**HE Plaintiff in Ejectment made his Title under several Deeds, and at the Trial the Jury found against them; and upon Motion, the Court ordered them to be kept in the Officer's Hands, in order to a Prosecution for Forgery: But on Application to the Court of Chancery, from whence the Issue was directed, a new Trial being granted, the Plaintiff moved to have the Deeds out of Court. (6.) 1 Salk. 215.

Holt C. J. As this Case is, the Deeds must be delivered out, because they were not directly in Issue upon the Pleadings in the Cause; but if the Issue had been Non est factum, it would be otherwise. If a Bond be found on a Trial not to be the Deed of the Defendant, it has been adjudged, that it shall not be cancelled, but be kept in Court, because the Judgment might be reversed by Writ of Error. See Grants. Co. Lit. 231. 5 Rep. 74. 1 Lill. 419.



## DEER-STEALERS.

King *versus* Chaloner. Mich. 11 W. 3.( 1. )  
Cases W. 3.  
314, &c.

**C**HALONER was convicted upon 3 & 4 W. & M. c. 10. of Deer-stealing, upon an Information exhibited against him before a Justice of the Peace, for killing several Fallow Deers, &c. contra formam Statuti, by which he had forfeited 30 l. for each Offence, upon Non-payment a Warrant was issued against him, directed to all the Constables of the County, to have the Money levied by Distress; and the Constable of Dale, which appeared to be another Parish than that where C. was an Inhabitant, return'd that he had nothing in Dale, or any where else in the County; whereupon the Justice committed him to Prison for a Year, and to stand on the Pillory. All this appearing on Habeas Corpus.

Holt C. J. Your Commitment is not pursuant to the Statute, for that is indeed that there should be a Warrant to levy the Money by Distress, and a Return thereof made; but not that if it should be returned, that he has no Distress, that thereupon he should commit him; and here the Commitment is a Judgment; and therefore you ought to be satisfied that he has no Distress, and make a Record thereof, and say, For as much as it does appear unto me, that he has no Distress, I do hereby, &c. Vide Doctor Bonham's Case, 9 Co. For what Authority has the Constable of Dale to return, that he has no Distress in the County at large. The Prisoner upon this Exception was discharged.

The King *versus* Chandler. Hill. 11 W. 3.( 2. )  
Carthew  
508, 509.

**U**PON a Conviction grounded on the Statute made against Deer-stealing, the Defendant was committed by a Justice of Peace, and being brought up into this Court by Habeas Corpus, the Court was moved that he might be discharged; for that the Commitment was illegal, because the Method intended by the Statute was not pursued: And here the first Warrant to distrain was ill; and there

there was only a Recital of it in the Warrant of Commitment, but no Record thereof certified as it ought.

By Holt C. J. The Method of Prosecution upon this Statute must be thus; the Person convicted, if present, may be detained in Custody two Days, in which Time the Justice is to make what Inquiry he can, if the Penalty may be levied by Distress: And if he finds there is nothing to distress, then he must make a Record of it by Way of Adjudication; that it appearing unto him the Party hath not any Goods by which the Penalty may be levied, therefore in Pursuance of the Statute he doth award him to Prison, &c. which must not be before the End of two Days. And if the Person is absent when convicted, the Justice is to make a Warrant to distress; and if there be nothing upon which a Distress may be made, after two Days he must make a Record thereof as above, and then issue out his Warrant of Commitment.

In this Case the Commitment was held void, and the Defendant discharged.

The King *versus* Whistler. Hill. 1 Ann.

ONE Rolfe and others were convicted summarily of Deer-stealing, upon the Act 3 & 4 W. & M. and if the Defendant was unlawfully and unjustly aiding and assisting to the said Rolfe, &c. in the unlawful and unjust Killing of the said Deer, viz. by persuading and inciting him to kill the same Deer, and lending Dogs to hunt and kill, and Horses to carry away the said Deer, against the Form of the Statute, &c. And whether this was an Aiding within the Statute, was the Question? (3.) Farrel. 129, 134. 2 Salk. 342.

Holt C. J. I observe, tho' my three Brothers agree in one Conclusion, yet they differ in the Premises; and I differ from them both in Premises and Conclusion: Every Body knows, that this being a penal Law ought by Equity and Reason to be construed according to the Letter of it, and no farther; and that this Act is penal, is most plain, for here is a Penalty of 30l. and what is highly so, the Defendant is put to a summary Trial different from Magna Charta: For it is a fundamental Privilege of Englishmen to be tried by Jury, which Privilege has been secured to us by our Ancestors many Hundred Years ago. Then where a Penalty is inflicted, and a different Manner of Trial from Magna Charta instituted; and the Party offending,

sending, instead of being openly tried by his Neighbours in a Court of Justice, shall be convicted by a single Justice of Peace in a private Chamber, upon the Testimony of one Witness; I vain would know, if on the Consideration of such a Law, we ought not to adhere to the Letter of the Law, without carrying Words farther than the natural Sense of them. The Defendant here is not within the Words of the Statute, he not being actually present at the Fact; and this Case differs from Trespass, because the Penalty is laid on one particular \* Person; not as he is a Trespasser at large, but as he offends under such Circumstances: And let the Preamble of the Statute be what it will, and recite what it will, it is not enough to bring Persons under any Penalty, if there be not Words in the enacting Part of the Statute to do it; and I never heard of such a Rule, that because a Preamble of a Statute recites many Particulars, and enacts a Penalty only upon one of them, that the Penalty shall be extended to all by Construction. Therefore this Case not being within the Letter of the Act, ought not to be brought within the Equity of it: And he concluded, that the Conviction ought to be quashed. But the Court was against him.

\* Cro. Car.  
340.  
Kel. 52.  
1 Anq. 116.

## D E F A U L T.

Sleigh *versus* Chetham. Trin. 1 W. & M. Intr.  
Mich. 1 Jac. 2. Rot. 96. See 1 Lutw.

(1.)  
1 Show. 20.

**I**N a Formedon in Remainder, the Tenant appears by Attorney, and pleads several Pleas; and after Issue joined, a Venire is awarded, returnable Trin. at which Time the Tenant doth not appear, but casts an Essoin; the Essoin is challenged, that is adjourned to Hilary-Term, and an Imparllance from thence to Pasch. and then because the Tenant saith nothing to save his first Default, there is a final Judgment given for the Demandant. Error is brought.

Holt C. J. This Essoin is a Default, but yet it is a saveable Default: For suppose the Attorney or Party were in Prison, an Essoin is no Estoppel, because it is cast by a

Stran-



Stranger. If it had been a Default without casting of an Essoin, it had then been saveable: Now if it be an ill Essoin, why is it not also saveable? and when shall it be saved? Not till it be judged to turn to a Default; he had Day given him upon the Question, whether it was a Default? but when it was adjudged against him, it turned to a Default, and then he is thrown out of Court; and he hath no Day in Court but upon the Return of the Petit Cape. Adjournatur.

Judgment afterwards affirmed by the whole Court. 1 Lutw.

Staple *versus* Haydon. Trin. 2 Ann.

**I**N Action of Trespasses for several Trespasses, the Defendant pleads by Way of Justification to one Trespass, and demurs as to the other; and Issue being joined, the Cause came down to be tried at Nisi prius: But the Defendant made Default, and thereupon the Inquest was taken by Default; and there was an immaterial Issue.

Holt C. J. The Question here first is, Whether if Default be in a personal Action, after Declaration and Day given over, either by Imparlance or at any other Day, if this be so peremptory that Judgment final ought to be upon that Default? In personal Actions before Issue joined, every Default is peremptory; but after Issue joined, the first Default is not so, but the second is; and this is by the Statute of Westminster, c. 27. Generally if after the Issue is joined, the Defendant makes Default, the Plaintiff may proceed to Trial, and have the Inquest taken by Default; but he shall not have Judgment by Default, except in some special Cases. In Debt upon Bond, if the Defendant pleads a Release, and Issue is thereupon joined, and at the Trial he makes Default; the Plaintiff may pray Judgment, and the Inquest need not be taken by Default, for by this Plea the Duty is confessed; 'tis otherwise on Non est factum pleaded, where the Duty is denied: But in Trespasses, if the Defendant plead a Release, and make Default, the Plaintiff cannot pray Judgment by Default; but must pray the Inquest by Default; for in the other Case the Debt is certain, but here the Damages are uncertain: And in Annuity, which tho' personal, yet partakes of the Nature of a real Action, after Default there shall be a Distringas ad audiend. Judic. to give the Defendant an Opportunity to save his Default; because tho' the Recovery

(2.)

1 Salk. 216,

217.

Mod. Caf. 1.

8, 9.

18 Ed. 4. 7.

36 H. 6. 19.

Co. Lit. 144.

1 Lev. 32.

105.

2 Lev. 135,

142, 164.

3 Lev. 20.

440.

1 Vent. 60.

2 Show. 274.

1 Keb. 23, 89.

shall charge the Person only, yet it may be of an Inheritance. If the Tenant makes Default in a Real Action, a Grand Cape is awarded; and upon the Return of it, if the Demandant insists upon the Default, he must have final Judgment; but he may waive it, and take an Appearance, for here the Tenant comes in by Process: And so it is of a Default on a Petit Cape; but in a Personal Action, there is no Process to bring the Party into Court again. And he said, if at a Day given upon a Writ of Error, the Defendant makes Default, the Writ of Error may go on, and the Judgment be affirmed; because it is no new Judgment that is given for the Defendant, who is now out of Court by his Default, but only his former Judgment affirmed and ratified: And generally a Man that is out of Court may have a Judgment given against him, tho' not for him. In this Case the Bar was cautioned never to make Defaults at Nisi prius, because no Judgment could be afterwards given for the Defendant: But the Court were of Opinion, that the Issue was helped by the Statute of Jeofails.

## D E F E A S A N C E.

*Lacy versus Kynaston.* Trin. 12 W. 3.

Cases W. 3.  
415.

**I**F A. covenants to do such a Thing, and Covenantee agrees to save him harmless, that is a Defeasance of the Covenant. If Two be bound jointly and severally in a Bond, and Release is to one of them, it releases the several as well as the joint Lien. A. is bound by Bond to B. and B. covenants not to put it in Suit till such a Time, it is a Defeasance; but if he grants not to sue upon it at all, it is a Release.

# DEFENCE.

Ferrer *versus* Miller. Pasch. 4 W. & M.

Ejectment. **T**HE Defendant venit & dicit, that the Land is ancient Demefine, without making any Defence. To this there was a special Demurrer. 1 Salk 217.

Holt C. J. The Plaintiff might have refused the Plea, for Want of a Defence; but if he receives the Plea, he admits a Defence.

# DEMURRER.

By Holt C. J. **A**T Common Law, there were special Demurrers, but they were never necessary but in Cases of Duplicitie, and so were seldom practised; for as the Law was then taken to be upon special Demurrers, the Party could take Advantage of no other Defect in the Pleading, but that which was specially assigned for Cause of his Demurring: But on a general Demurrer he might take Advantage of all Manner of Defects, that of double Matter only excepted; and there was no Inconvenience in such Practice; tho' after the Reformation, when the Practice of Pleading was altered, the Use of general Demurrers still continuing, thereby this publick Inconveniency followed, that the Parties went on in arguing a general Demurrer, not knowing what they were to argue; therefore the Statute 27 Eliz. was made, by which 'tis enacted, that the Causes of Demurrer should be expressed in all Cases, and this was restorative of the Common Law. 3 Salk. 122.  
27 Eliz. c. 5.  
See 4 & 5  
Ann. c. 16.

There have been many Things adjudged ill upon a special Demurrer, which are otherwise on a general Demurrer: A Demurrer to Evidence admits the Truth of the Fact, but denies its Effects in Law. 1 Lev. 76.  
Keil. 76.

Departure



## Departure in Pleading.

Primmer *versus* Phillips. Pasch. 6 W. & M.

1 Salk. 222.

**T**RESPASS for Taking the Plaintiff's Cattle in alta via Regia at such a Place; the Defendant justified the Taking for Damage-feasant; to which the Plaintiff replied, that Time out of Mind there had been a certain Way between such a Place, &c. and that the Defendant drove his Cattle over the Way, and en passant the Cattle eat, &c.

Lutw. 1437.

Holt C. J. The Trespass is transitory, and the Mention of it in the Declaration as done in alta via, was nothing to the Purpose, but idle and meer Surplusage; and therefore the Plaintiff in his Replication, by following the Defendant to another Way, doth not depart, because it was not materially alledged in the Declaration; and a Departure must be from something that is material. And he said in another Case, that there is a great Difference between a Bond and a Trespass; if the Declaration lays the Bond to be dated one Day, the Replication cannot say it was dated on another; but in Trespass, Time is but a Circumstance, and the Plaintiff may depart according to occasion.

Judgment for the Plaintiff.

Mod. Caf.  
215.

Per Holt C. J. If a Plaintiff lays a Day in his Declaration that is not material, and the Defendant by his Plea makes it material, and then the Plaintiff in his Replication varies from the Day in the Declaration, in this Case it will be a Departure; but it would be otherwise if the Day had not been made material by the Plea.

# DEPUTIES.

Parker *versus* Kett. Pasch. 13 W. 3.

**I**N Ejectment for Copyhold Lands, the Question was, <sup>1 Salk 97, 98.</sup> Whether a Steward of a Manor by Patent to exercise the Office by himself or Deputy, who had appointed one his Deputy, and that acted as such for many Years; if this Deputy could appoint an under Deputy, to take a Surrender, &c.

Holt C. J. He who is Deputy to another, hath full Power to do any Act or Thing which his Principal might have done; that is so essentially incident to a Deputy, that a Man cannot be such to do any single Act or Thing, nor can he have less Power than his Principal: And if his Principal makes him covenant that he will not do any Thing which the Principal may do, the Covenant is void and repugnant. The Authority of the Deputy cannot be restrained to be less than that of his Principal; save only he can't make a Deputy, because it implies an Assignment of his whole Power, which he cannot assign over: But here the Person appointed by the Deputy, is to do a particular Thing, who is therefore as well authorized as if the Principal had given him that Power; indeed if he had not been constituted to do a particular Act, but to be the Deputy's Deputy, this had been void, and he would have had no real Authority; tho' that would have given him the Colour and Reputation of an Authority, to act as a Steward de facto, and what he does as such is sufficient among the Tenants.

Although an Under-Sheriff must act in the Name of the High-Sheriff, because the Writs are directed to the High-Sheriff, and for other Reasons; yet any other Deputy may act, either in his own Name, or the Name of his Principal: So is the Judgment in Comb's Case, tho' in arguing it is said to be otherwise.

Cro. Eliz.  
534.  
Moor 109.  
1 Lev. 288.  
2 Cro. 552.  
2 Roll. 101,  
130.

9 Rep. 76.  
1 Roll. Abr.  
330.

## D E T I N U E.

The Queen *versus* Browne. Mich. 2 Ann.

6 Mod. 87. Holt C. J. **D**etinue lies for a Box of Writings; and if any of them concern Lands, it will be prudent to name it, for that shall oust the Defendant of his Wager of Law; but it suffices that the Things which it contains be certain enough. And if any new Action be brought, Defendant shall say, that a former Action was brought for the same, by the Name of so many Bundles, &c. and the Queen had Judgment.

## D E V I S E.

Edleston *versus* Speake. Hill. 1 W. & M.

(1.)  
1 Show. 89. **E**jectment, Special Verdict. Upon a Trial at the Bar, the Jury finds, that the Plaintiff's Lessor is Heir at Law to J. S. that J. S. by Will, according to the Statute, devised the Lands in Question to the Defendant. Then they find another Writing, published by the Testator as his last Will, in the Presence of three Witnesses, revoking all other and former Wills, and that the Witnesses to this last subscribed their Names thereto in the Hall adjoining to the Room where he was, but in such a Place that he could not see the Witnesses; which last Writing gave the same Land to the Defendant. Et si, &c.

Judgment for the Defendant.

Note; It was said by Chief Justice Holt, and not denied by the rest of the Court, If a Devise be to A. and B. and their Heirs, and A. dies before the Testator, the other shall have the Whole by Survivorship.



Burchett *versus* Durdant. Trin. 2 W. & M.

**I**N a Writ of Error upon a Judgment in an Ejectment in the King's Bench, where the Plaintiff Mary Durdant declared upon the Demise of William Durdant, of two Messuages, 100 Acres of Land, &c. in Cobham in the County of Surry. (2.)  
2 Vent. 311, 312.

Upon Not Guilty, the Jury gave a Special Verdict, That Henry Wicks was seised in Fee of the Premises, and by his Will in Writing, dated the 6th of June 1657, he devised in the Words following, viz. I give to my Cousin John Higden and his Heirs, during the Life only of Robert Durdant my Kinsman, all those my Messuages, &c. in Cobham in the County of Surry, upon this Trust and Confidence, that he the said John Higden and his Heirs, shall permit and suffer the said Robert Durdant, during his Life, to have and receive the Rents and Profits thereof, which shall yearly grow due and payable, he the said Robert committing no Waste. And from and after the Decease of the said Robert Durdant, then do I give the said Lands and Premises in Cobham unto the Heirs Males of the Body of him the said Robert Durdant now living, and to such other Heirs Male and Female as he shall hereafter happen to have of his Body; and for Want of such Heirs, then to the Use and Behoof of my Cousin Gideon Durdant, and the Heirs of his Body; and for Want of such Heirs, the same to be and remain to the right Heirs of me the said Henry Wicks.

They find that Wicks died the 2d of December 14 Car. 2. seised as aforesaid, and that John Higden entred, and was seised prout lex postulat, and by Deed bearing Date the 1st of January 14 Car. 2. reciting the said Will, and that Robert Durdant and Gideon Durdant had contracted with the said John Higden for the Sale of the said Messuages, Lands and Premises. And to the Intent that the contingent Remainder, by the said Will limited to the Heirs Males and Females of the Body of the said Robert Durdant, might be extinguished and destroyed, he the said John Higden, by the Appointment of the said Robert Durdant, did surrender his Estate in the Premises to the said Gideon Durdant; and by the said Deed it was covenanted, that the said Robert Durdant, John Higden and Gideon Durdant, shall levy a Fine of the Premises, which should be to the Use of the said John Higden and his Heirs.

They

They find a Fine was levied accordingly in Easter Term 15 Car. 2.

They find that Robert Durdant died on the 19th of August 20 Car. 2. and that John Higden after, in 20 Car. 2. upon a valuable Consideration in Money enfeoffed John Burchett of the Premises; and that the said Burchett died the first Day of October in the same Year; and that the Premises from him came to the Defendant Burchett, who entered into the Premises, and became seised prout lex postulat.

And they find, that Robert Durdant as well at the Time of the said Will making, as at the Death of the said Henry Wicks, had an only Son called George Durdant, who was also Godson to the Testator; and that the said George Durdant died, and that William Durdant (Lessor of the Plaintiff) was his Son and Heir, and entered, and made the Demise prout, &c. & h super totam materiam, &c.

Upon this Special Verdict Judgment was given in the King's Bench for the Plaintiff.

And the Court here afterwards, having heard the Case thrice argued, did affirm the Judgment.

### Burchett *versus* Durdant. Mich. 2 W. & M.

(3.)  
Carthew  
154, 155.  
T. Jones 99.  
1 Vent. 334.  
2 Vent. 311.  
Raym. 330.

**E**rror in Parliament upon a Judgment in the Exchequer-Chamber, which was in Affirmance of a Judgment in Ejectment brought by Durdant against Burchett in B. R. the Case being on a Devise in hæc verba:

ff. I give unto John Higden and his Heirs, during the Life only of Robert Durdant, my Lands in D. upon Trust, to suffer the said Robert Durdant, during his Life, to receive the Rents and Profits, (the said Robert Durdant committing no Waste) and after the Decease of the said Robert Durdant, I do give the said Lands unto the Heirs Male of the Body of him the said Robert Durdant, now living, and to such other Heirs Male and Female as he shall hereafter happen to have of his Body, &c.

At the Time of this Devise, and at the Death of the Testator, the aforesaid Robert Durdant had only one Son named George Durdant, and then living.

After the Death of the Testator, the said John Higden and Robert Durdant join in a Feoffment and Fine of the Premises to Burchett, the Plaintiff in Error, and the Defendant in Error was Lessee of the Son and Heir of George Durdant.

The general Question was, Whether George Durdant, the Son of Robert, took a present Remainder in Tail by this Will as a Purchaser, and so vested in him immediately upon the Death of the Testator, or else a contingent Remainder, (viz.) if he happened to survive his Father Robert Durdant; for if so, then it was barred by the Fine and Feoffment supra, because the Remainder could not commence at the Time of the Determination of the particular Estate, as in the common Case of Remainders limited to the right Heirs of J. S. and the particular Estate determines living J. S.

But all the three Courts, (viz.) of King's Bench, Exchequer-Chamber and Parliament, held clearly, that it was a Remainder vested in George Durdant immediately upon the Death of the Testator, and that the Words in the Will, now living, were a sufficient Description of the Person of George Durdant, and that the other Words, (viz.) unto the Heirs Male of the Body of Robert Durdant, did not only help to make up the Description of the Person of George, but were a good Limitation of an Estate-tail to him, as in the Case supra, where it is limited to the right Heirs of J. S. there the Word Heirs serves not only to describe the Person, but to limit the Estate.

Wherefore the two former Judgments were affirmed; and there was the like Judgment in Parliament concerning Part of the same Lands, in Ejectment between Jones and Richardson, another Purchaser of Parcel, under Higden and Robert Durdant.

Thomas and Howell. Mich. 3 W. & M.

**Z** Achary Thomas seized in Fee of the Manors of D. S. and V. and having three Daughters, Jane, Mary and Sarah, by his last Will devises D. to Jane and her Heirs for ever, at or before she attain the Age of twenty-one; this Estate was of the Value of 200l. per Annum; and if she refuse to marry my said Nephew Theophilus, or be married to any other before she attain the Age of twenty-one Years, then he devises D. to his second Daughter Mary, and to her Heirs; and he devises S. to Mary and her Heirs, with the like Limitations, and B. to Sarah and her Heirs; and then he said, Provided, and my Will is, that if neither of my said Daughters shall be married to my said Nephew before their re-

M m m

spective

(4.)  
Skin. 301,  
319.



spective Ages of twenty-one, then I devise the said Estates of D. and S. to my Wife, and five other Trustees, and they to sell and dispose of the same, and the Monies raised by such Sale, to distribute among his said Daughters, as they shall think them deserving. Theophilus died an Infant of twelve Years of Age, Jane the eldest Daughter being then fourteen Years of Age; Theophilus never demanded her Consent, or that she ever refused to give it. Then they made a special Conclusion, that if the Entry of the Defendant was lawful, then they found for the Defendant; if not, for the Plaintiff, &c. and not according to the usual Way, according to the Issue upon Not Guilty pleaded. And Judgment was given for Jane the eldest Daughter, who was Defendant by her Guardian; upon which a Writ of Error was brought.

Skin. 319.

In another Term. By Eyres and Dolben; the Estate to Jane is become absolute, for there is no Default in her, she not having refused. And per Eyres; A general subsequent Clause in a Will shall never be extended farther than the first Clause, which is special; as in the Case of a Devise to J. S. and the Heirs Males of his Body, and if he die without Heirs of his Body, this shall be intended Heirs Males of his Body. And they said, Though Jane had refused, yet there is no Reason to deprive Mary; and here Jane had not refused, and therefore there is no Default.

And Dolben said; Though the Marriage with Theophilus was an Intention, it was not his primary Intention, but that his Lands should go to his Daughters; and because Mary could not consent till Jane had refused, and Jane never refused, and so there was no possible Default in Mary; and the Trustees cannot sell till both have refused; therefore they were of Opinion that the Judgment for Jane, the Lessor of the Plaintiff, shall be affirmed. Justice Gregory contra.

And Holt C. J. said, that he was not clear with the Opinion of Dolben and Eyres; but it seemed to him, that the first Intention of Zachary was, that one of his Daughters scil. Jane or Mary, who were of a suitable Age (for Sarah was an Infant) shall marry his Nephew Theophilus; for in every Devise he repeats it, and in the Proviso that if Jane refuses, and in the last Proviso, upon which the Question principally arises. But he said, if his Intention did not take Effect, for one of his Daughters marrying Theophilus, and by this the Continuance of the Land in the Name, that then he did not intend any Preference to his Daughters,

but

but then the Lands were to be sold; but he said that this Point was not ripe for their Resolution, but that he, upon the whole Case, was of Opinion that the Judgment shall be affirmed; for the Clause, that says, that if Jane or Mary do not marry Theophilus before their Age of Twenty-one, that then the Trustees may sell, does not give an Interest to the Trustees till their Age of Twenty-one, and it appears in the Special Verdict, that Jane had not attained her Age of Twenty-one, at the Time of the Ejectment brought.

For the Testator had appointed the Time, within which the Condition ought to be performed. But if no Time had been appointed, it shall be during the Life of the Party; and he who is to enter for the Condition broken, has brought his Action too soon; and therefore the Judgment for Jane ought to be affirmed.

Lamb and Archer. Pasch. 5 W. & M.

**A.** Possessed of a Term for Years had Issue Richard his eldest Son, and John his second Son, and devised the Term to Richard and the Heirs of his Body, and if he dies without Issue, living John, then to John and the Heirs of his Body. Richard dies without Issue, living John; and if John shall have it was the Question upon a Special Verdict? The Court said, this was in Effect the same Case with the Duke of Norfolk's, and seemed to confirm the Opinions in the Duke of Norfolk's Case, and that here was not any of the Inconveniencies of Perpetuities; for the Estate is not unalienable, but only during one Life, and this upon a Contingency which might determine within a little Time, if the Party dies. (5.) Skinn. 340.

And Holt C. J. said, That he never saw the Reason of those of Counsel with the Duke of Norfolk; and always was of Opinion, that Mr. Charles Howard had a strong Case of it; and so he gave Judgment for those who claimed under John the younger Brother, nisi, &c.

Goodright *versus* Cornish. Pasch. 6 W. & M.

**U**PON a Special Verdict in Ejectment, whereby it was found, that John Nowlin being seised in Fee, &c. and having two Sons, John and Richard, devised the Lands (6.) Com 254.

Lands in Question to his Son John for fifty Years, if he so long lived; and, after that Term ended, he devised the Lands to the Heirs Males of the Body of his Son John; and if he died without Issue, Remainder to Richard, and the Heirs of his Body. John the Devisor dieth; John the Son enters, and suffers a Common Recovery to the Use of the Defendant Cornish, and dieth without Issue.

Holt C. J. An Estate for Life is a good Foundation for a Remainder to work upon, and down; but not so of an Estate for Years. Here the Term could not be merged, because the Freehold is in the second Remainder-man, and therefore the Recovery no Bar.

Judgment for the Plaintiff.

*Reeve versus Long.* Pasch. 6 W. & M.

(7.)  
Cases W. 3.  
53.

**I**N Ejecment 'twas found by Special Verdict, that J. Long seisd in Fee had three Brothers, A. B. and C. and devises these Lands to A. for Life, Remainder to the first Son of A. in Tail Male, and so to the second and third Sons; and for Default of such Issue to B. for Life, and to his first, second Son, &c. in like Manner; Devisor dies, A. being unmarried; A. marries, and dies without Issue born, but his Wife was Privement enseint with a Son who is born after: In C. B. it was held, that the posthumous Son had no Title; and it was affirmed here: And they held, that a Remainder to the first Son of A. was a contingent Remainder, and so must take Effect according to the Rule in Archer's Case; but at the Time of the Death of A. there was a Default of Issue Male, upon which the Estate vested in the Possession of B. and shall not be removed again by the Birth of a Son after. And this is no executoy Devise, upon the Rule in 2 Saund. 388. where a contingent Estate is limited to depend on a Freehold, capable to support the Remainder, it shall never be construed an executoy Devise. This Judgment was reversed in the House of Lords.

*Dalby and Champernoon.* Hill. 7 W. 3.

(8.)  
Skinn. 631.

**S**IR Edmund Vowell was seised in Fee of the Lands in Question, and of divers other Lands in the Counties of Cornwall and Devon, and having Issue two Sons, John and



and Edmund, upon the Marriage of John he settles Part of his Lands to the Use of John for Life, and after to Elizabeth his intended Wife, and after to John in Tail, and after to John in Fee, and other Lands in the County of Cornwall to John in Fee, and he settles the Lands in Question, which were Vowellscumb, Balerscumb, and Whitcomb, to the Use of himself for Life, then to John for Life, with a Proviso to preserve the contingent Remainders, and then to the first and all the Sons of John in Tail Male, and in the same Manner to Edmund, Remainder to the right Heirs of John. Sir Edmund dies, and after John (being Sir John) having Issue John, Elizabeth and Margarer, made his Will, and devised all his Land, Tenements, and Hereditaments to Cary and his Wife in Trust, to allow 50*l.* per Annum a-piece to his two Daughters, and to raise so much for their Portions, and after in Case his Son dies without Issue, he devised all his Lands, &c. except Langston, Lister, and Thavies, to Elizabeth his Daughter in Fee, and he devised Langston, Lister, and Thavies, to Margaret in Fee, and then he recites, that whereas he was seised of other Lands, &c. and in the End of the Will, he takes Notice of a Request of his Father, that Wowellscumb, &c. (being the Lands in Question) should go for Want of Issue Male of Sir John and Edmund his Brother, to their Cousin John Vowell, and that in Obedience to the Will of his Father, he is desirous that it be observed, and requests Edmund his Brother to act accordingly, and after dies, and his Son John, and Edmund, without Issue.

And Holt C. J. Who delivered the Resolution of the Court, said that tho' as to the Lands in Question Sir John had only a dry Reversion in Fee, yet by the Words, All his Lands, Tenements, and Hereditaments, such Reversion would pass by the Generality of Words. Yet when it after appears by the special Words, that such general Words ought not to extend to all his Lands, Tenements, and Hereditaments, there an Exposition ought to be made according to the special Words, according to the Rule in Altham's Case, 8 Rep. for otherwise the special Words would be rejected. Therefore here, the Words Forasmuch as there are other Lands, &c. ought to qualify the general Words; and other ought to be understood, not mentioned before, and he concluded that by these general Words the Manors of Vowellscumb, &c. did not pass, but that they descended equally to Elizabeth and Margarer, and gave Judgment accordingly for the Defendant.

Lord Falkland *versus* Bertie & Ux', & al'.  
Hill. 1697.

(9.)  
2 Vern. 333,  
&c.

John Cary of Stanwell, Esq; having neither Wife nor Child, and the Defendant Elizabeth, now the Wife of Mr. Bertie, being his Niece and Heir at Law, on Sept. 10. 1685. he made his Will, and thereby devised his Manor of Stanwel, and divers other Manors and Lands, being his own real Estate, (except his Manor of Caldicot, which he thereby gave to his Kinsman Edward Cary) to Grout, Hall, and Whitlock, and their Heirs, upon Trust (inter alia) to pay what Debts and Legacies his personal Estate should not extend to satisfy; and then in Trust, for the Honourable Elizabeth Willoughby, the Defendant, his Cousin and Heir, in Case she should within three Years after his Death be married to Francis Lord Guilford, for her Life; and after her Death, in Case such Marriage was had, to the eldest Son of the Lord Guilford on her Body to be begotten, and to the Heirs Males of the Body of such Son; and for Default of such Issue, to all other the Sons of the said Elizabeth by the Lord Guilford in Tail Male; and in Default of such Issue, or in Case such Marriage should not take Effect, within the said three Years, then in Trust for Anthony Lord Falkland for Life, and to his first and other Sons in Tail Male; in Default of such Issue, in Trust for Edward Cary, the Plaintiff's Father for Life, and to his first and other Sons in Tail Male; and in Default of such Issue, in Trust for the right Heirs of the said John Cary the Testator: And devised to his Trustees, the Leasehold, subject to the same Trusts as are declared concerning the Freehold, and devised to them his Household-Goods at Stanwell, that the same might go and be for the Benefit of such Person, who by Virtue of his Will shall be intitled to his House.

Sept. 18. 1685. He made a Codicil, only directing some other Legacies.

The 20th of the same Month, he makes another Codicil, reciting, that by his Will he had appointed the Trust of his real Estate to be for the Benefit of the Honourable Elizabeth Willoughby, in Case she should within three Years after his Decease be lawfully married to the Lord Guilford. Now his Will is, that if the said Marriage should take Effect before Years of Consent, and if not afterwards

(when of a competent Age) ratified, the said Elizabeth Willoughby should have no Benefit of the said Trust, other than she should have had, if the Marriage had been never solemnized, and devotes the Tutition of his Niece to the Lady Wiseman, the Lord Guilford's Sister, and soon after died.

The Marriage between the Lord Guilford and Elizabeth Willoughby did not take Effect within three Years: And after they were elapsed, she intermarried with the Defendant Mr. Bertie; having first by her Trustees, come to an Agreement with Anthony Lord Falkland, and Edward Cary, (the Plaintiff's Father) that they, on the Terms agreed on, should permit her to enjoy the Estate; but they being both but Tenants for Life, and since dead, the Plaintiff, the Son and Heir of Edward Cary, brought his Bill, claiming the Benefit of the Trust, demanding an Account of Profits, and a Conveyance of the legal Estate from the Trustees.

Mr. Bertie and his Wife had also brought their Bill to the like Effect. This Cause was heard by the Lord Chancellor Somers, assisted with the two Chief Justices, and this Day was appointed for the Delivery of their Opinions.

Lord C. J. Treby argued, and gave his Opinion for Lord Falkland.

Lord C. J. Holt was of the same Opinion, That the Bill ought to be dismissed, viz. Mr. Bertie's: And first was clear of Opinion, that all the Parol Proof as to what the Testator either declared or intended was to be disallowed, and the Case must stand confined to the Will, and is to be considered as it stands upon the Will alone; and must have been so even before the Making of the Statute of Frauds and Perjuries; for by the Statute of Wills, by which Men are enabled to make Wills, and devise their Lands, it must be a Will in Writing; and should parol Proof be admitted, it would introduce a mighty Incertainty, and an infinite Inconvenience. The Last Will of a Man is looked upon as the last serious Act of his Life, as to the Disposition of his Estate; and must be admitted to repeal all such former Wills, and much more to control all parol Declarations.

It is plainly a Condition precedent, in Cases of Conditions subsequent, that are to defeat an Estate, those are not favoured in Law. And if the Condition becomes impossible by the Act of GOD, the Estate shall not be defeated or forfeited, and a Court of Equity may relieve, to pre-

vent



vent the Devesting of an Estate; but cannot relieve to give an Estate that never vested. The Case of Fry and Porter is much a stronger Case; and more proper for Relief, the Condition there being to be performed by an Infant; and an Infant too, that had no Notice of the Condition in the Will. In the Case of the Earl of Mountague and the Earl of Bath, there the Duke of Albemarle who made the Settlement, and had reserved a Power to revoke, yet having tied himself to strict Terms as to the Manner and Circumstances of doing of it; although by his Last Will, made in a very solemn and deliberate Manner, he sufficiently expressed his Intention and Resolution to revoke it; yet the Court would not relieve in that Case; and if the Party himself, who was Master of the Estate, and might have disposed of it as he pleased, is to be tied down to the Terms and Circumstances he had imposed upon himself, those that claim or derive under him, those to whom he gives an Estate upon Terms and Conditions, must stand much more obliged to the Performance of the Conditions and Circumstances upon which it is given. And if the Condition becomes impossible even by the Act of God, as in Case the Lord Guilford had died within three Years, or soon after the Death of the Testator, he was of Opinion the Estate would never arise, there would be no Relief even in that Case; much less is there any Room for Relief in the Case in Question.

On the Will, the Testator's Intention is plain and express, that his Niece should not have the Estate unless the Marriage took Effect. An actual Marriage was plainly by him intended upon the Face of the Will; and, by his further Declaration in the Codicil, put beyond Doubt. The Prospect that such Marriage might take Effect, seems to be the only Consideration that induced him to give the Estate in such a Manner as he has done. It appears by the Proof in the Cause, that he had a real Kindness and Affection for the Lord Guilford; and as he had a Kindness and Affection for his Niece, so it likewise appears he was desirous to preserve the Estate in his Name and Family. And whereas it is objected, that the Heir at Law is to be favoured; that may hold where the Words are ambiguous and doubtful; there shall be no strained Construction to work a Disinheritance. But where there is no Doubt, no Ambiguity, the Plea of Heirship must not control a plain and express Will; and it is very vain, what has been pretended, That he did not intend to disinherit his Heir; when the whole

Frame and Intent of his Will is to prevent the Descent; and that she should not take as Heir. And it is likewise as vain to talk of an Equivalent; although the Lady may be as well preferred or advanced in Marriage to Mr. Bertie, that is no Equivalent to the Testator, who had an Affection for the Lord Guilford; and was, for ought appears, an utter Stranger to Mr. Bertie; and was minded his Niece should marry the Lord Guilford. It is, in Truth, no more an Equivalent, than it may be pretended to be a Performance of the Condition; and it would be hard to maintain, that where an Estate is given upon Condition that the Niece marries one Man, to say she has performed that Condition, not in marrying him, but in marrying another Man; and concluded, that if it was a Rule in Equity, that Estates ought to go according to the Will of the Dead, he must advise the Lord Chancellor to dismiss the Bill; but if this Court can alter Wills, it might be proper to relieve the Plaintiff in the cross Cause.

The Lord Chancellor concurred in Opinion with the two Chief Justices, and decreed accordingly.

N. B. There was afterwards an Appeal to the House of Lords: But it ended by Compromise.

Bamfield *versus* Popham & al'. Hill. 1701.

HENRY ROGERS, by Will, devised his Estate to Trustees and their Heirs, in Trust for the Defendant Popham for Life, and to his first and other Sons in Tail; but in Case the Defendant Popham died without an Heir Male of his Body begotten, the Trust to be void. And in such Case he gave the Estate to Defendants: The Will was brought to stay Waste, and for an Account of Timber already sold, Mr. Popham having no Son.

The Question was, whether the Words, If he die without an Heir Male of his Body begotten, gave him an Estate-tail by Implication. And it was held it could not enlarge an express Estate devised to him for Life.

Afterwards Mich. 1703.

This Case came on to be argued before the Lord Keeper, assisted with the Lord Chief Justices Holt and Trevor, and Justice Powell, who all unanimously agreed, that Mr. Popham

ham had only an Estate for Life; and that it was a fixed Rule in Law, that an express Estate for Life cannot be enlarged by an Implication; by express Words it may, as in the common Case, if an Estate be given to J. S. for Life, and after his Decease to the Heirs of his Body, that by express Words enlargeth his Estate, and makes him Tenant in Tail: But it is otherwise in this Case, where an express Estate for Life is limited to him, and his first and other Sons in Tail, provided If he die without an Heir Male, or if he dies without Issue Male, or for Want of Issue Male; altho' such Words are sufficient to create an Estate-tail, yet it is only by Implication, and when an express Estate for Life is not before limited. Even in a Will, an Implication shall not alter an express Estate; but where there is a subsequent Devise in express Words to the same Person, to whom an Estate for Life was before devised, that will enlarge the Estate, as in the Case of Plunkett and Holmes, or Wedgewood's Case in Siderfin; the Case of King and Melling cited; Milliner and Robinson's Case, Moor 682. Frencham's Case; 43 Eliz. Burleigh's Case cited by Hale; Clerk and Davy, Rolle 839. Devise to Rose for Life, and if she have Heir of her Body, the Heir to have it; adjudged that Rose had only an Estate for Life. Cro. El. 313. Owen 148. Bullington and Barnardiston, Devise to Evers Armin for Life, if he died without Issue Male, Remainder over: Agreed it would not make an Estate-tail.

1 Sid. 47.

1 Vent. 214.  
fo. 101.

And it was said that the Reason of the Thing, and Intent of the Testator, as well as the Rules of Law were against him. First, For that it is plain the Testator intended that the First and other Sons should take by Purchase, and not by Descent, and the Occasion of the Proviso, That if he left no Heir Male, &c. was not intended to enlarge the Estate, but to govern and direct what was to become of the Trust, in Case there was no Son to carry it over to the Plaintiff. And as to the Objection, that a Posthumous Son was not expressly provided for, but might be by this implied Estate-tail. It was answered, that was a remote Contingency, and it may be, not thought of by the Testator; he might not think it necessary to provide for a Posthumous Son; but manifestly thought it necessary to provide, that it should not be in the Power of the Father to bar his Son; and therefore made him but Tenant for Life; and besides, it being of a Trust, that might support the Remainder to a Posthumous Son.



Secondly, It was objected, That by the Codicil, the Testator recites, he had devised an Estate-tail to the Defendant. It was answered that in common Parlane, and in ordinary Acceptation, where an Estate is given to the Father for Life, and to his first and other Sons in Tail, it is looked upon as an Entail; and is the strictest Way of Entailing an Estate. But secondly, a Recital in a Will or Codicil cannot amount unto a Devise: 2 Vent. 56.

Thirdly, As to Sunday's Case in the 6th Report, if he have Issue Male, his Son to have it; and if he die without Issue Male, the Estate to go over: There adjudged, the Son should have an Estate-tail; but that no Way affects this Case, because no express Estate for Life.

It was admitted that no Estate-tail, even in a Deed, may be raised by Implication; as is adjudged in the Case of Gardner and Sheldon in Vaughan's Reports, and where there is not any express Estate before limited, as a Devise to a Man and the Heirs of his Body, and then comes the Clause, If he die without Heir, that shall not enlarge the Estate by Implication, but by express Words it may be done; as in Lewis Bowles's Case, 11 Rep. Covenant to stand seised to the Use of a Man and his Wife for their Lives, Remainder to the first and other Sons, Remainder to the Heirs of their two Bodies; there the Remainder is express and good.

Decreed an Injunction to stay Waste, and an Account of what Timber was felled.

Smith *versus* Tindall. Mich. 5 Ann.

**I**N Ejacketment, the Case was, Maximilian Taylor, being (11.) seised in Fee of the Premises in Question, died, and left by his Will all his Lands, Tenements and Hereditaments, and all his Personal Estate, Money, Goods, Household-stuff, Chattels, and all other Moveables whatsoever, unto his Wife, reserving 20 l. per Annum to be paid to an Alms-house for ever, to be distributed amongst poor Children, and to Two of the most indigent Children two grey Coats yearly. After the Testator's Death, his Wife married Archibald Clinkard, and then she and her Husband levy a Fine and suffer a Common Recovery, and the Premises in Question were settled upon the Wife for Life, the Remainder to Archibald Clinkard, and his Heirs

Heirs for ever; the Lessor of the Plaintiff claims as Heir to Archibald Clinkard, and the Question is, What Estate the Wife had by this Will?

Gould J. She hath an Estate in Fee-simple.

1. Because of the Perpetuity given to the Alms-house.

2. The Words seem to be placed so as to comprehend all that he was worth in the World, which is as much as to give a Fee-simple. 1 Sand. 180. Moor 873. Hob. 2.

3. Because the Word Hereditament implieth a Fee; as to give all my Lands, Tenements and Hereditaments, is a Fee. 1 Jones 330.

Powell J. She hath an Estate in Fee, not from the Words in the Will, all my Lands, but by Reason of the Perpetuity.

Holt C. J. She hath a Fee-simple, by reason of the Word Hereditament; for if he had intended to have given her only an Estate for Life, the Words all my Lands and Tenements would have sufficiently implied a Freehold, without the Word Hereditament; and therefore that Word doth make her have an Estate in Fee, for hæreditas significeth an Estate descendible, as well as that which is descended. Inst. 6. & per Curiam Judgment for the Plaintiff.

### Bronker *versus* Coke. Hill. 5 Ann.

(12.)  
A Man de-  
vises all his  
Lands, and  
after buys  
Lands; and  
resolved,  
the Lands  
bought after  
did not pass;  
and said, If  
a Man de-  
vised *Blackacre*  
in particu-  
lar, it would  
not pass; a-  
gainst the O-  
pinion in the  
Case of *Brett*  
*versus* *Rig-*  
*en in Plowd.*

**U**PON a Special Verdict, the Case was, that A. being a Sea-faring Man, and Captain of a Vessel, was to go a Voyage, and made his Will, whereby he devised all his Goods and Chattels, and all his Lands and Estate which he had, or should have, to his Wife, and made her his Executrix; and afterwards he made his Voyage, and returned back into England, and purchased some Gavelkind Lands in Kent; it was also found, that he had no Lands of Inheritance at the Time of the Making of the Will; the Devisor died, and the Question was, Whether these Gavelkind Lands should go to his Wife, and did pass by the Will?

Raymond for the Plaintiff said, The Lands do pass by the Will, for that a Testator is supposed to be Inops concilii, therefore his Intent and Will to be favourably construed; for which I shall trouble your Lordship with Authorities. A Will is also said to be ambulatoria usque ad mortem, so that the Death of the Devisor gives Life to the Will. There will arise two Questions, first, Whether this

be good by the Statute of Wills? Secondly, Whether it be good by the Custom of Gavelkind?

First, as to the Statute of Wills; The Preamble shews that there was a Liberty granted to every Person to dispose of his Lands and Tenements by his Will in Writing, and the Statute is to be taken very favourably and beneficially; I should take it as a Statute restoring the Common Law of the Land; for before the Conquest, I take it, that all Lands were devisable, and that Kent obtained from the Conqueror their Laws allowed to them, which was called the Custom of devising: But let that be how it will, I take it, that the Statutes of Wills have been ever favourably expounded. But it will be objected, that there is a Necessity for a Man to be seised at the Time of the Devise, to have the Lands devised, otherwise the Lands will not pass; and that on the Construction some great Ben have put upon those Statutes, all Persons having any Lands, Tenements, &c. in Socage, &c. So was the Opinion of Dyer in Brett and Rigden's Case, Plowd. 344. and the Lord Coke followed that Opinion in Butler and Baker's Case, 3. C. 30. b. where he is very elaborate in the Construction of the Statute 34 H. 8. c. yet I must take Notice, that the Opinions of Dyer and Coke are nothing at all to the Point in Judgment, of either of those Cases wherein they are cited; and the Cases cited by Coke to warrant his Opinion, are not at all to the Purpose; and I take it, with Submission, that the Law has been taken otherwise, as the Case put by Serjeant Lovelace in Plowd. 344. If I devise the Manor of Dale to B. and his Heirs, and afterwards I purchase the Manor of Dale, and die, this Manor shall pass by this Will, and yet I had it not at the Time of the Devise; which was not denied by the Court; and which I take to be good Law, for a Will is not consummated till the Death of the Devisor. If a Man devises to his Wife, it is good for this Reason, for though during his Life he could not give her any Lands, yet he may by Will, quia morte consummatum est, and she does not take till then, yet at the Time of making and writing of the Will she could take nothing. So if there be an intermediate Capacity, that shall not hinder the Effect of a Will, as if A. devises to B. and then becomes a Lunatick, yet B. shall have the Land; so in our Case, the Will being ambulatory till his Death, and his Intent appearing, that the Plaintiff should have this Estate, I think the Reason and the Authorities of these Cases do destroy the Opinions of



Coke and Dyer. As to this Point, it will be objected that the principal Case of Brett and Rigdon, Plowd. 340. is against me, but that is not so, for it is but comparing the Cases; for there the Intent of the Devisor did not appear, that Thomas Brett should have the Lands purchased after, because there were other Lands to satisfy the Words of the Will; not so here, for we can get no Lands but these, for there are no other. It was also heretofore held, that a Devise to a Person not in esse was not warranted by the Statute of Wills; but a Devise not in esse, as to an Infant in Ventre sa Mere, was held good 11 H. 6. 13. by Babington. 7 C. 9. b. Moor 177, 220, 639. 1 Lev. 139. 1 Ro. Rep. 254. I say it is good, if there be future Words, and that is by favourable Construction of the Statute, which has, as I observed, been always favourably taken.

Second Point. By the Custom it is carried as far as by the Statute, when the Intent appears, nay further, because a Man may devise Lands devisable by Custom tanquam catalla, for so are the Words of the Writ, ex gravi querela, F. N. B. 199. b. so that a Man may dispose of them the same Way as he may dispose of his Chattels. And as to that, if I devise all my personal Estate, the personal Estate which I acquire afterwards shall pass, as was said by Manwood, Plowd. 343. and was the Construction of Wills before the Statutes of Wills; for if I devise Lands which I have not, and after purchase those Lands, they shall pass; so is F. Devise 17, 10. so is M. 39 H. 6. 18. b. Stat. Devise; so Br. Devise 15. and Lit. Sec. 167. says, that a Man may devise Lands by the Custom which he hath at the Time of his Death. So that by these Books it should seem, that it is not necessary he should be seised of the Lands at the Time of the Devise made; for if his Intention does sufficiently appear, that he did intend to dispose of them by his Will, then if at any Time he comes to have them before he dies, that is sufficient: For I take it that they might by Custom dispose of their Lands by their Wills, as they might dispose of their Chattels. So that in our Case, it is plain that the Intent of the Devisor appeared, that his Wife should have all his Lands; and whether this Devise shall be taken by the Statute, or by Custom, I hope we shall have Judgment for the Plaintiff.

Serjeant Parker for the Defendant argued contrary, and said, that the Circumstances of this Case are very particular; for the Devisor could have no Intent, nor no Prospect to give these Lands to the Devisee, for the Will was made

in 1692, and he died in 1700; so that he being a Sea-faring Man, and going a Voyage, he had no Lands, and made only a Description of what he had then, because it was very probable he might never return, and if he did, he could have no Prospect of any future Acquisition; so that this Will was pro hac vice only. But I do think there are two Points to be considered; for,

1. I think he had no Power to dispose of these Lands.

2. It does not appear that he manifested his Intent sufficiently to make these Lands pass.

As to the first; It was the Policy of Common Law, that Lands should not pass by Wills, for that would be the Disinheritance of the Heir, who was the Darling of the Law; but this Case, if allowed, goes not only further than any Case that has been yet adjudged, since or before the Statutes of Wills, but further than any Grant has been ever construed.

First, as to the Statute of Wills, I may say of that as of all other Acts of Parliament, that they are ever construed according to the Rules of the Common Law; so is Co. Lit. 327. a. b. and therefore, as a Man cannot convey by Deed in his Life before he is seised, &c. so he cannot devise Lands before he is seised; and as to the first, that no Estate shall pass before he has it to convey, vide 2 Bulst. 304. But it will be said, that was a present Estate to be conveyed, but suppose the Covenant that I and my Heirs shall stand seised of all the Lands which I have, or shall have at my Death, to the Use of B. and his Heirs, after my Death, if I purchase other Lands, no Use shall rise to B. out of them; so is the Case of Yelverton and Yelverton, 3 Cro. 401. Noy 19. Moor 392. 2 Ro. 790. So if I covenant that I and my Heirs shall stand seised to the Use of you and your Heirs of the Manor of Dale, and after I purchase the Manor of Dale, no Use shall arise, because I had nothing in Dale at the Time of making the Deed, 2 Ro. 790. 7, 8. though there he had said that he did hereafter intend to purchase the Manor of Dale, vide ibid. And those Cases are as future as a Devise; and an Use was as much and more easily disposed of at the Common Law than the Lands themselves; so that a Covenant to stand seised of Lands which I have not, and a Will of Lands which I have not, are bad, though in both Cases the Lands come to the Party before the Deed or Will is to take Effect. It is true, that the Statute of Wills gives Persons the same Power over their Lands, which they had before of disposing of Uses at Common Law, but no more: So that as no Use

would

would arise out of the Lands which they had not at the Time of raising the Use, so they cannot dispose of Lands by the Statute of Wills before they have the Lands. I do agree that a Devise may be to a Person not in esse, but it does not follow from thence that I can dispose of Lands which I have not. It is said that a Devise of all my Lands would pass all the Lands I should have at the Time of my Death, because a Will is ambulatory till Death; I do take it, that cannot be, for a Man cannot possibly have any Measure or Intention of a Thing that may be altogether contingent, and I think no Lands shall pass by such Will, but what he had at the Time of making of the Will, for then he knows what he has, and therefore may know how to square his Kindness, and shew his Love to his Friends; but this cannot be supposed, for possibly he may have no Thoughts of it; for had he any Knowledge of what was to happen to him, he would shew a Kindness to some other Friends, &c. and in our Case, as I said, it is very likely he would have done, had he any Thoughts of any new Acquisition: And I take it, if there be a Disability at the Time of making a Will, and this Disability is before his Death removed, yet the Will is not made good thereby; as if an Infant makes a Will, and after comes of Age, and dies, this Will is not good, 1 Sid. 162. So a Will by a Feme Covert, her Husband dies, and she dies, this Will is not good. So I take it, that a Man not being able to dispose of Lands which he has not at the Time of making the Will, a subsequent Purchase does not help. It may possibly be objected, that in the Cases cited there are personal Disabilities, not so in ours; but my Lord Dyer, in Brett and Rigden's Case, takes the Cases to be governed by the same Reason, on the Words of having in the Statute of Wills; so is Coke, Butler and Baker's Case; and I hope their Opinions will prevail in this Case; so is Moor 254, 255. Nor do I think the Custom will help them in this Case, for that the Custom is quilibet seifitus, &c. may devise; for the Word seifitus, and the Word having in the Statute of Wills, signify much the same Thing, if it be not stronger against them, as to the Custom, because that Customs against the Common Law are taken strictly; so is Sir John Savage's Case, 2 Leon. 208. so I think if the Word having be in the Act tied up to the Time of the Making, a fortiori the Word seifitus in the Custom must be tied to the Making also. Brett and Rigden's Case was much the same with our Case, it was also a Kentish Cause, and the



the Counsel were Kentish Men, and there was not one Word alledged of the Custom, which would not be omitted if it had such Force as they would give it here. It is said, and that very truly, that F. N. B. has these Words, *tanquam catalla*, in the Writ *ex gravi querela*, and the Words of the Writ are so, but that is not to be taken *omni modo*, for common Lands could not pass by Will, but Chattels might; but it does not follow that the Words which pass Chattels will pass even Customary Estates; as if you devise all your Estate, there all the Goods which you have at any Time, so you acquire them after the Will made, shall pass; but if you devise all your Lands, those only shall pass which you had at the Time of making the Will; so is Brett and Rigden's Case. And even personal Estates and Chattels, I take it, will admit of a Difference; as if I devise all my Plate, then I purchase new Plate, and die, the new Plate does not pass; but if I devise all my personal Estate, and acquire more, and die, all passes, because in the last Case the Person did intend all his personal Estate should go to such a Person, and that plainly by the Words: But in the first Case, he could not reasonably have any such Intention, Godolphin's Orphans Legacies 274. But I take it, that personal Estates can never be any Way a Rule to guide us in the devising of real Estates, because personal Estates are in perpetual Fluxuation, and no Body has a Right to them; but in real Estates it is not so, for that they are to descend to the Heir, who is the Favourite of the Law. A Devise to a Wife is good, so is a Covenant to stand seised, because the Baron has the Estate radically in him, which is after his Death only to come to his Wife; but he had Power to dispose thereof at the Making, which differs from our Case. As to the Case of Fitz. Devise 17. which is said to be in Point, I do confess it is very full, but I do deny it to be warranted by the Year-Book, but Br. Devise 15. is right, and does not affect our Case: But I take it, that Fitz. Devise 17, & 18. were transcribed out of Stath. Devise 11. 2s. for there Fitzh. depended on Stath. who led him out of the Way in both Cases; they never go so far in Chancery as they would in this Case. It is true, that in 2 Chancery Cases 144. a Devise was allowed of Lands he had not, but that was when he had a Prospect of having those Lands, for there a Treaty was on Foot for the Purchase of the Lands, and also he devised the Sale of the Lands for the Payment of Debts, which the Chancery makes always very extensive. As to the Case put by the Counsel in Brett and Rigden's

Case, if I devise the Manor of A. and after purchase it, that Manor passes, I take it not to be Law, for that none of the Judges have agreed that Case; but the contrary has been held by Dyer and Coke, as I have said before; yet admitting that Case to be Law, yet that will not warrant our Case, because where certain Lands are particularly devised, and then the Devisor purchases them, that shews his Intention particularly, that he did intend to purchase those Lands and dispose of them, so that he might have some View, and form a Judgment of what he was doing; but in our Case, and in all Cases where he does not particularize the Lands that he would pass, he could form no Judgment of it in his Mind.

Second Point: There is not a sufficient Declaration of his Intention, for the Reason next abovesaid; and if any Thing could make these Lands pass from the Heir, it is Implication only, and an Heir at Law is not to be disinherited by any Will, but by express Words, which is a common Rule; there are no Words to convey an Inheritance, only an Estate for Life; so is 1 Cr. 447. for in Truth the Devisor never thought to have any Lands of Inheritance, for this Will was, as it is found by the Verdict, made when he was going to Sea, and when he had no real Estate, nor, I dare say, did he ever think of having any; and it was to prevent Accidents, and dispose of what then he had; so also the Words here are coupled with Chattels and Mortgages, and shall be construed like 1 Cro. 447. 1 Ro. 834. 14 & 9. to extend only to Chattels. But if it should be taken to be a Fee in the Devisee by these uncertain Words, then it would be excluding the Children he might afterwards beget, which is not reasonable to be supposed to have been his Intention; vide Moor 832. The Intention of the Parties is to be specially considered and regarded, and sure no where more than in a Will. The Custom will not help in this Case, because it was more Chance than Design that he purchased Gavelkind Lands in Kent, more than other Lands in any other Place of the Kingdom; but I do take it, that such a Devise before the Statutes of Wills, could not be warranted by the Custom.

Raymond: The Case put by Serjeant Parker, of Covenant to stand seised, differs from our Case, because an Ale cannot be raised out of a Thing which I have not. As to the Case of Sir John Savage, which he cites, to prove that Customs are taken strictly, I think that Case was denied in the Case of Clements and Scudamore in this Court; for by that

that Case, and also by the Case of Reve and Master, 1 Cr. Customs are to be reasonably construed. And as to the Intention of the Party, I think it appears as plainly in this Will as in any I ever saw.

Holt C. J. If I devise the Manor of Dale, and afterwards purchase it, surely the Manor of Dale shall pass after my Death. If a Man devises all his Lands, and afterwards purchase more Lands, those Lands would pass by a new Publication; but now as to that the Law is changed by the Statute of Frauds and Perjuries, which requires another Ceremony. If I make a Charter of Feoffment of Blackacre, and afterwards purchase it, and then make Livery, Blackacre passes; secus if I had made Livery by Letter of Attorney. It is true, the old Law was very fond of Heirs, but now the Reason is altered, so is the Law; for we are now a trading Nation, and Trade is to be encouraged, therefore Fines, Recoveries, Uses and Wills were encouraged, that Traders might lay out their Money, and have Purchases, &c. And I take it, if I devise all my Chattels, and afterwards purchase a Lease for Years, that will pass thereby.

Powel J. This is a Case of Consequence, and to be considered. I agree, if I devise all my Chattels, the Leases I purchase afterwards shall pass; but by a Devise of all my Estate, if Gavelkind Lands which I purchase afterwards should not pass by the Custom, I should think, if the Devisee's Intent appeared to pass those Lands, it would be pretty hard to controul it.

Holt C. J. The Doubt to me is, Whether there be sufficient Words in this Will to make it appear to us that his Intention was that these Lands should pass. Brother Powell, you remember the Case of Sanders's Will, where he devised all the Lands he had, or hereafter should have, to the Smith's Wife, and we both did press Chief Justice Jeoffries to have that found specially, but he would not allow it. I think that a Man at this Day has the same Power over his real as over his personal Estate.

Bronker *versus* Coke. Pasch. 6 Ann.

SPECIAL Acredit. I do hereby give to my Wife all such (12.)  
Sum or Sums of Money, as shall be due to me for Wages at the Time of my Death, and also all such Lands and Tenements, and all my Estate whatsoever, whereof I shall



shall be possessed or invested with, or shall in any wise belong to me at the Time of my Death, &c. ut supra.

Broderick for the Plaintiff said, that here the Wife by Devise of all my Estate has a Fee-simple, for a Devise of all my Estate carries a Fee, if the Devisor had a Fee. Lands are devisable as a Chattel, by the Statute of Wills, for Lands were devisable by Custom *tanquam catalla*, Fitz. Devise 11, 20. Co. Lit. 111. a. 1. and Lands devisable by Custom might be devised by Parol. 1 Cro. 562. If one was seised at the Time of the Devisor's Death, it was sufficient, and it was not necessary he should be seised at the Time of the Will made. 44 Aff. 36. F. Prescription 36. For this Reason a Man may devise to his Wife, Sect. 168. and a Jointenant's Devise is not good, Sect. 287. *quia testamentum morte consummatum est*. If a Feme Covert devises, and after becomes sole, this is not good without a new Publication, there being an Incapacity at the Time of the Making. If I devise to the Children of A. this will not only extend to the Children that A. has at that Time, but such as he shall afterwards have. If I devise the Manor of Dale, and afterwards purchase it, this is good, per Loveles, Plowd. 344. This was good by the Custom, because my Intent appears; so in our Case. As to the Statute of Wills, the Word Having will not affect us, if it would, sure, as has been said by Mr. Raymond, it would have the same Effect in the Negative as in the Affirmative Clause; since that Statute an Use suspended may be devised. 1 Leon. 258. 3 Leon. 154. Dyer 315, 16. If I devise all the Goods which I now have in such a Room, and after I put in other Goods, they shall pass.

Holt C. J. Suppose the Devisee put in other Goods?

Broderick: I will say nothing to that, it may be a Fraud.

Sir Edward Northey for the Defendant; I think the Word Having in the Statute of Wills has been settled, and that was ever restrained to a present Right. It has been thought and held, that a Man could not by any Words convey any Lands which he had not. 2 Ro. 790. 7, 8. and Authorities cited by Serjeant Parker. For the Foundation of a Man's Power is the Having of the Lands; and I think People should be cautious of large Constructions in such Case, since Mens Inheritances depend upon it. I think it is agreed on all Hands, that a Devise of all my Estate will not carry away Lands which I have not; and Coke and Dyer give the true Reason of the Judgment in Brett and Rigden's Case to be on the Word Having, and not the

Intent of the Party; so is 3 Co. 31. a. b. where he says, a Man should have an Estate at the Time of writing or publishing. 1 Ro. 618. 6, 7, 8. 3 Cr. 493. A Devisee cannot devise, because he has but a Right; so a Man cannot devise a Reversion which is discontinued, Cr. Cha. 405. And tho' the Statute of Wills brings in a new Way, yet it is to be construed by the Rules of Law, and he that could not grant, cannot by this new Law devise, as Infants and Feme Coverts, though they are Persons having, because they are incapacitated by the Common Law. 3 Co. 31. a. 3 Cr. 526. The Form of Pleading in all the Entries is, that A. was seised in Fee, &c. and being so seised devised; and the Law is best known by Pleading. 3 Cr. 530. The Case put by Serjeant Loveless was only for his Client; and the Case of Yelverton and Yelverton, 3 Cr. 401. is directly contrary in the Case of a Covenant to stand seised, which is always as favourably construed as a Devise, though a Parol Devise might be good by Custom, yet it can be good only for what he had at the Time of the Devise. And it is a received Opinion, says Coke, that the Will takes its Effect from the Making. As to what was said, that by Custom Lands were devisable *tanquam catalla*; it was very true, that a Man had a Power to dispose of his Lands, as of his Chattels, but that does not make out that his Lands were devisable as Chattels were. And even in the Case put by Broderick, where I devise my Goods in such a Room, only those Goods which were in the Room at the Time of making pass; Swinburn of Wills, 418. And though it was said, that a Devise to an Infant in *Ventre sa Mere* is good, which I agree, yet that is nothing to this Case, it does not appear that he did intend to convey this real Estate, for the Will was made in 1692, and he died in 1700; he made it when he went to Sea, and had no Thoughts nor Intent to purchase. Besides, the Words or Nature of the Thing is against you, for it is the common Form of a Seaman's Will, which can never carry Lands, being coupled with his Wages, and other Chattels. 1 Cr. 447, 449. Welkinson and Maryland. The Will of the Lord Chief Justice Sanders was to this Effect, and Jeoffries was so clear in it, that he would not suffer it to be found specially.

Holt C. J. I was in that Case of Sanders's Will, and cannot agree with you, Sir Edward, for I would be very glad to have had it found specially. If A. devises a House, and after purchases it, will it not pass?

Sir Edward Northey; No, according to Butler and Baker's Case.

Holt C. J. When a Man's Intention is plain, why should it not pass, for the Word Having in the Statute of Wills is no more than the Law implies, there's not a Word of Seisin in the Will, and I think the Words in it are very loose.

Powell J. I took the Case put by Loveless in Brett and Rigden's Case to be Law, for when he particularly mentions a Thing which he has not, and afterwards purchases it, it is, I think, the same Thing as if he had it at the Time of Making the Will, for his Intent is plain.

Holt C. J. The Words should be very plain, but there I think them uncertain.

Broncker *versus* Coke. Mich. 6 Ann.

(13.) Holt C. J. **D**elivered the Opinion of the Court: We are all of Opinion the Devise is void as to his Lands, not but that the Words are full enough to pass Lands, but because he was not seised at the Time of the Devise made; and we all agree that he intended the Lands should pass, but all the Lands he should have, are not sufficient Words to pass them, for by the Law he can give no Lands but such as he had at the Time of Making the Will; and tho' these Lands were in Kent, yet as to this Point it is the same Thing as if they had been only devisable by the Statute, tho' a Will does not take Effect till the Death of the Maker, yet 'tis a Will from the Making, unless it be revoked, so that if there be a Disability at the Time of the Making, tho' that Disability is removed before the Death, yet the Will shall not be held good, as Infancy, Lunacy, or Coverture, unless there be a new Publication, to which since the Statute of Frauds and Perjuries the same Ceremony is requisite, viz. signing and attesting; those I mentioned, 'tis true, are personal Disabilities, and I know no Reason why a real Disability will not have the same Effect; this Will as to these Lands can have no Inception, and if so, then you will have an End without Beginning, 'twill be said, that it might begin at the Time of the Purchase, which I deny, for that Purchasing and Disposing are different Acts; you must in Pleading say, that he was seised in Fee, and being so seised did devise. Co. Entr. 602. Rast. Entr. 274. where 'tis a Will by Custom; so is 34 H. 6.



6. a. 'tis true, that Pleading does not make the Law, yet the constant Way of Pleading is strong Evidence of the Law; it was objected, that Lands by the Custom are devisable *tanquam catalla*, and for that F. N. B. 199. B. was cited, and that Goods and Chattels may pass by a Will, tho' the Testator had them not at the Time of the Devise, to which the same Authority gives an Answer; for there 'tis not said that he may dispose of Tenements generally, but that he may dispose of *tenementa sua tanquam catalla*; so if they are not *sua* at the Time of the Disposing, they are not within that Rule, so that they must be *sua*; there is a great Difference between a real and a personal Estate, the one Permanent, the other Transient; 'twould not be reasonable, that a Tradesman should be obliged to make a new Will as often as he changes his Goods into Money, or his Money into Goods; but when a Man purchases a real Estate, there 'tis reasonable he should make a Will if he has a Mind to dispose of it, for the Law has appointed one to succeed in the real Estate, but none to the personal Estate; but a late Statute has appointed an Administrator to distribute, so the Disposition of them are different; if I devise Lands to one, the Devisee immediately on my Death shall have it; but if I devise so much Money, the Devisee cannot have this; but it is in the Executor till he assents to the Legacy, so that the Law appoints an Heir, but 'tis the Testator appoints an Executor; I do not undertake to judge of Chattels real, because it belongs to another Law; but if A. had a College Lease, and B. gives it away by Will, and after he does purchase it from A. I doubt it would not pass. Vide Goldsb. 93. March 137. To make this Will good is to make the Purchase repugnant, for the Will gives it to the Wife, and the Purchase to him and his Heirs; and therefore I do not hold the Case in Plowden, put by Serjeant Loveless, to be Law, viz. A. devises Blackacre to B. and his Heirs, and after purchases it, I hold B. shall not have it, and the Case 39 H. 6. 18. b. Br. Devise 15. do not warrant that Opinion, (to which Powell agreed). If a Man seised in Fee is disseised, and then devises the Lands, and then re-enters and dies, the Lands shall pass, because by the Re-entry the Disseisin is purged, and reverts the Estate, and he may bring Trespass, and so the Seisin by the Re-entry may be said to continue in the Disseisee, 11 Co. 51. b. 38 H. 6. 28. a. b. and so being seised he may dispose, but in the Case at Bar, the Purchase was made eight Years after the Will. If a Lord gives

gives away his Manor, and afterwards a Tenancy for life, that Tenancy passes as Part of the Manor: So a Man seised of a Reversion expectant upon an Estate for Life, devises it, and afterwards Tenant for Life dies, and then the Testator, yet it passes; so if Lands are devised to Two, and one of them dies before the Testator, the Whole shall go to the Survivor, adjudged in C. B. 16 Car. 2 Bridgman being Chief Justice; Co. in the Case of Butler and Baker, lays a great Stress upon the Word Having, but I do not take it, that it does depend so much on the Word Having, as on the Nature of the Thing, and there all the Judges in the Exchequer-Chamber agreed with him, and here Judgment ought to be for the Defendant. 1st, Because a Will is a Will from the Making, unless it be revoked. 2dly, Testator must be seised before he can dispose. 3dly, Upon the Difference between a real and personal Estate. 4thly, Because the Will is repugnant to the Purchase.

Judgment for the Defendant.

Buckenham *versus* Cook. Mich. 6 Ann.

- ( 14. ) **E** Testament of Lands in Kent, upon Not guilty pleaded, the Jury find a Special Verdict, That the Testator upon the 3d of May, 1692. made his Will, in which he took Notice of his going to Sea, and for Fear of a sudden Death, devised as followeth, I do hereby give and bequeath unto my Dear Wife, Frances Buckenham, all such Sum and Sums of Money that now are, or shall hereafter become due to me for Service done, or otherwise, and also all my Goods and Chattels, Lands, Tenements, and Hereditaments whatsoever which I now have, or shall hereafter have, at the Time of my Death. And I do appoint my said Wife to be my Executrix, of this my Last Will and Testament. And then the Jury find, that the Testator at the Time of Making his Will was not seised of any Lands or Tenements; but that eight Years after he returned from Sea, Sir George Wheeler, and others, being seised in Fee of the Lands in Question held in Socage and of the Nature of Gavelkind, did convey them to the Testator and his Heirs, by which he became seised in Fee, and that he died without republishing his Will; and they find further, that the Testator had two Sons, A. and B. and that A. died without Issue, and B. entered and leased to the Plaintiff.

The Question is, Whether those Lands do pass to the Devisee, the Devisor not being seised of them, nor in any wise intitled to them at the Time of Making his Will?

M. Raymond, among other Things, argued to the following Effect:

The Will of a Man is what he would have done after his Death. 1 Inst. 111. a. It is but ambulatory till his Death.

This is not a Term for Years, which may be disposed of by Custom, but a Freehold Estate which may be disposed of by Will. 40 Aff. 41. Why may not a Devise of Lands, which a Man hath not at the Time of the Devise, be as good as a Devise to Man not in esse. By Custom a Man may devise Lands which he hath not at the Time of the Devise, as he may Chattels.

Where a Man under Age makes his Will, and becomes of full Age, that Will without Republication will be of no Effect, because he was not capable of Devising at the Time when he made his Will. But in this Case it cannot be said that the Testator was not capable. Litt. Sect. 168. Com. 341. Brett and Rigden, Fitz. 17. 2 Chan. Rep. 144. 1 Chan. Rep. 39. I agree that a Will must co-operate at the Time of the Making, or else it will be of no Effect, 3 Cro. 68. Dyer 319. where a Man made his Will and became Non compos, 11 H. 6. 12. Bro. tit. Devise 32. 7 Co. 9. 1 Roll. 214. 1 Lev. 135. Moor 404. 1 And. 139. 1 Leon. 354. 256. Manning v. Andrews, 1 Roll. Abr. 399, 400. 2 Roll. Abr. 790. 4 Leon. 2. Where a Man deviseth all the Goods that he hath in such a Room, and some Time after he hath made his Will he puts several other Goods into the Room; those that were afterwards put in shall pass by this Devise, as well as those that were in at the Time when the Devise was made. If a Man make his Will, and deviseth all his Goods and Chattels, and after purchase a Lease, this Will is good, and the Lease doth pass.

Sir Thomas Parker contra. A Will ought to be construed in Favour of the Heir. 32 H. 8. Inst. 327. and as much as possibly it may, in Favour of the Common Law. 34 H. 8. Dyer 354. Here in this Case is Want of Power in the Devisor, he not being seised, which bears some Resemblance to the Case of a Rent-charge. 36 H. 8. 2 Bull. 304. Doctor and Student 17. a. 1 Inst. 42. Hob. 132. Com. 144. A Use may take Effect in futuro, 3 Cro. 401. but no Use ariseth where a Man hath no Possession. Gould. 150. 2 Roll.



790. 2 And. 12. 1 Sid. 162. Where an Infant of twenty Years of Age makes a Will, and deviseeth Lands before he hath any, it is of the same Effect in Law with this Case; Butler and Baker's Case, 3 Co. 30, 31. is not parallel with this, for there was an Intent, but here is not, it being eight Years after he made his Will, that he purchased this Estate. The Custom of Gavelkind Lands is said to go along with them. Godol. Orph. Legacy 294. Land may be devised by Custom, and by the Stat. Swin. 61. 1 Inst. 98. b. Office of Executor 305. A Devise of all Lands in general, shall be intended of no other Lands but what a Man hath at the present; there is a fundamental Difference between a Devise of Lands and of Goods. Dyer 319. 1 Leon. 256. Manning v. Andrews, Moor 50, 54. 39 H. 6. 18. Bro. Devise 15. Stath. Devise 11, 12. Mich. 28 H. 6. Allen 54. by these Books there is no Opinion that a general Devise of Lands is good. How the Words of a Will may be construed if they do not disinherit the Heir, vide 1 Roll. 834. Moor 832.

Sir Edward Northey ad idem: The Word (Having) is a material Word in the Statute which gives Power for the Making of a Will, for a Man must be a Person, having at the Time that he makes his Will, because that is the Foundation of his Power. A Man that cannot give by Deed, cannot give by Will. Com. 343. 3 Co. 31. a. Roll. Ab. 7, 8, 9. 3 Cro. 493. Jones 457. When a Man is disseised, he cannot by his Will devise those Lands of which he is disseised. A Man cannot devise a Reversion that is discontinued: And this Case goes farther, for here was only a Possibility of having; as before the Statute, a Man might give by Deed, so now by the Statute he may give by Will; the one falls under the same Rules of Law as the other. Infants can't devise, tho' they have; because they have not a Capacity. For a Man must be capable, and having, or else he cannot grant, and consequently can't devise. 3 Co. 32. a. 3 Cro. 526. To devise what a Man hath not, is contrary to all Rules of Law; for in Pleading it must be said, that he was seised, and being so seised dedit & devisavit. A Will must be compleat when 'tis made, or no other Act will make it so. A Man may covenant to stand seised of a Reversion in futuro, but not of a Reversion which he shall have in futuro. 2 Roll. 790. The Case in 3 Cro. 401. is taken to be void, and it doth seem like the Case of a Devise, 3 Co. 29. Butler and Baker; the same in Moor 401. pl. 255. 3 Cro. 423. Fuller and Fuller.

ler. A Will must be construed according to the Intent of the Testator, but then that must be ruled by Law. All Words whatsoever in a Will, being among Chattels, will be of the like Nature.

Powell J. A Grant must take its Effect presently, but the Intent of a Testator in his Will hath a great Influence, and this is revocable, where a Man by his Will gives Lands, saying Blackacre which I intend to purchase, this is a good Devise.

Holt C. J. If a Man devise an House by Name, and after purchase that House, it has been held to be a good Devise.

This Case being several Times argued, Holt C. J. this Term delivered the Opinion of the whole Court: We are all of Opinion that the Lands do not pass by this Will, though we do agree that the Words are sufficient to pass them; yet the Testator not being seized of them, by Law could not devise them, notwithstanding it was his Intention so to do. If a Man makes his Will, and deviseth that which he hath not at the Time of the Devise, that Will is void, for he cannot give that which he hath not at the Time, although it be an Estate devisable by Custom, or he hath a Power to devise by the Statute. Though a Will doth not take Effect, so as to pass the Land, 'till the Death of the Testator, yet there is a Disposition as soon as the Will is made; and there is no Act requisite between the Making and the Death of the Testator, to make it a compleat Will. If there be a Disability at the Time of making the Will, Hob. 225. if it be removed before the Death of the Testator, yet the Will is void, if it is not republished after the Removal of that Disability. As if an Infant or Feme Covert make a Will, there is a Disability; and if the Party die before the Will is republished, that Will is void, although he or she lives to have a disposing Power; because it is void at the Time of making, and the Removal afterwards will not make it good. Now in this Case, here is a real Disability, and in the other but a personal, and it cannot be said that a personal Disability is greater than a real. Force and Hembling's Case, 4 Co.

The Law of England is plain as to this Point, not only where Lands are devisable by the Statute, but also by the Custom. The Pleading is, that the Testator was seized in Fee, and being so seized did dispose. Coke Ent. 602, 604. Rastal's Ent. 274. 34 H. 6. 6. a. Though Pleading do not make a Law, yet it is a great Evidence of Law, and that shows

shews that he should be seised. It has been objected, that Lands devisable by Custom differ from those devisable by the Statute, because they are devisable as Goods and Chattels; and for this Purpose was cited F. N. B. 199. Secundum consuetudinem in eadem, &c. which, say they, shews that a Man may devise them though he hath them not. To this I answer, The Custom is not that he shall dispose of terras & tenementa generally, but they must be sua, and there is a Difference between Chattels and a real Estate; for that of Chattels is not fixed, for a Man may one Day have a great Estate in Goods, and the next it may be changed into Money, and then a Man would be obliged to make a new Will almost every Day, could he not dispose of those Chattels he had not at the Time of the Devise; but a real Estate is always the same. And there is another Difference between a real and a personal Estate, for the Law hath directed how a real Estate shall go, but in a personal Estate, the Law hath not appointed any one to succeed, but by the Statute the Administrator is to dispose of it in Right of the Deceased; which is but a Direction how he shall administer; that the Law hath appointed an Owner to succeed in the one Case, and not in the other. If a Man hath a College Lease in the Manor of D. and another devise this by Will, and after purchase the Lease, that will not be good, which is stronger than the present Case. March 137. Southward and Millward. Goldsb. 93. a strong Case. It is to be observed, that here was no Republication of the Will, for then it would have been sufficient to have passed those Lands, if it had been according to the Statute of Frauds and Perjuries; and to make this a new Will, it must be new signed and tested. The Case of Brett and Rigden in Com. 341. I hold not to be Law, for the Judgment there is given because it was the Testator's Intent; and the 39 H. 6. 13. Fitz. tit. Devise 9. Bro. tit. Devise 15. which are there cited, are not as in that Case said to be. If a Man is disseised, and in the Time of his Disseisin makes his Will, and after re-enters, that Will is good, for by his Re-entry he hath purged the Disseisin, and is seised to all Intents and Purposes whatsoever, and he may have his Action against the Disseisor for the mean Profits. 38 H. 6. 37, 38. 11 Co. 51. Lyford's Case; but that is not like this Case, for here was not Jus in re, nor any Probability to have the Estate. And if such a Will as this should be adjudged good, it would be of bad Consequence, and a Cause of great Confusion; for then the Son in the



Life of the Father might dispose of his Father's Estate; and if he died after his Father, that would be good. If a Man hath a Reversion, by his Will he may pass that in Possession, as Davis and Kent 16 Car. 2. in C. B.. If a Man hath a Manor, and devise it, and before his Death a Tenancy at will, this Tenancy will pass by the Will, because the Manor is devised, and that is Part thereof, and not a different Thing. The Words of the 32 & 34 H. 8. are, any Person having, but a Man may dispose of a personal Estate by his Will, though he be not a Person having. We are all of Opinion that this Will is not good for the Lands in Question.

Powell J. When this Case was argued, I thought the Will might be good; but I have since searched the Books, and cannot find one Case to confirm that Opinion; for they all agree, that a Man must be Owner of the Land at the Time of making of his Will.

## D I S C E N T.

Price *versus* Langford. Pasch. 2 W. & M.

**T**here was a Special Verdict in Ejectment; it was found, that J. S. was seized of Lands in Fee, as Heir of the Part of the Mother, and he and his Wife levied a Fine with Warranty, to two others, and they by the same Fine granted and rendered to him and his Wife, and the Heirs of their two Bodies, Remainder to the Husband's right Heirs. The Question here was, if this did alter the Descent, or change the Estate, so as to make the Heirs by his Father inheritable? (1.)  
1 Show. 92,  
93.

It was insisted for the Plaintiff, that the Descent was not altered by this; that the Fine alters no Estate, but it remained as it was before: For the Law shall reject the new Title, and judge the Heir in of the old. But it was answered, that this doth alter the Estate; for the first Institute is express, that by a Re-infeoffment he takes as a new Purchaser. 1 Inst. 73.  
6 Rep. 63.  
Cro. Eliz.  
727.

Holt C. J. This is an Estate in the Conusee, and the Render is a new Purchase; and the Cases of Uses come  
T t t not

not to it, for before the Statute they were but Things in Equity. It is a Conveyance at the Common Law, the Conusor now claims under the Render; and this Fine and Render make a Feoffment and Re-feoffment at Common Law to alter the Discent.

Judgment was given for the Defendant.

The Lessee of Carter *versus* Tash. Hill. 6 W. & M.

(2.)  
1 Salk. 241.

Far. 73.

**I**N Ejectment, Holt C. J. held these Points for Law; 1st, If Lessee for Years be made Tenant to the Præcipe, by Lease of a Freehold to suffer a common Recovery, by this the Term is not merged, but preserved and revived by the Saving of former Rights in the Statute of 27 H. 8. of Uses.

Co. Lit. 241.  
b.

2dly, If a Termor levy a Fine come ceo, &c. this shall not bar him in the Reversion, for he may avoid it by Plea of Partes finis nihil habuerunt. 3dly, A Discent which tolls Entry, ought to be an immediate Discent. Therefore if a Feme Disseisors take Husband, and hath Issue, and dies, and after the Husband dies, the Discent to the Issue does not take away Entry, because the Interposition of Tenant by the Curtesy does impede it. 4thly, Coverture to avoid a Discent ought to be continual from the Time of the Disseisin to the Discent, for if a Feme be sole at the Time of the Disseisin, or of the Discent, or any Time intermediate, her Entry is not preserved, because she had an Opportunity to enter and prevent the Discent. Upon this last Point the Plaintiff was nonsuited. 1 Inst. 338, 246, 353.

Mich. 3 Ann.  
Mod. Caf.  
241.

2 Cro. 590.  
3 Cro. 161.

If a Devise be to the Heir at Law, paying such and such Legacies, &c. and for Default thereof, the Remainder over, the Heir, till Default, is in by Discent, and the other's Interest is by Way of Executory Devise: And so it was in Effect in Pell and Brown's Case, where the Fee was devised to one that was not Heir, the Remainder to him that was Heir, there the Heir was adjudged in by Discent.

Uide Borough English.

## DISCONTINUANCE.

Sutton *versus* Sparrow. Mich. 6 W. & M.

**A**n Appeal of Murder de morte viri was carried down to be tried at Nisi Prius in Yorkshire last Assizes; the Appellant did not put in the Record to try the Issue; and now the Counsel for the Defendant moved, that the Appeal not being tried, it was either a Nonsuit or a Discontinuance.

But Holt C. J. was of Opinion that it was neither, but ordered the Appellant to pay Costs for not going on to Trial.

Hunt *versus* Burn. Hill. 1 Ann.

**A**Tenant in Tail of an Estate levies a Fine to the Use of another, for his Life, with Warranty; after which he levies a Fine to the Use of himself and his Heirs, with Warranty; and afterwards bargains and sells to one and his Heirs.

Holt C. J. held, that the first Fine made a Discontinuance, but it was only for the Life of the first Conusee, because the wrongful Estate that causes the Discontinuance, was but for his Life, and the Discontinuance could remain no longer than that Estate: And the second Fine could not enlarge this Discontinuance, for the Estate raised by the Fine returned back to the Conusor, and therefore of Consequence the Warranty which was annexed to it was extinguished.

Knight's Case. Hill. 2 Ann.

**A**ction of the Case being brought against Knight by a wrong Name, the Defendant pleaded in Abatement: Upon this the Plaintiff, without proceeding further, brought a new Action against him by his right Name.

By Holt C. J. The Plaintiff should first have discontinued his first Action; and it will be too late to do it after another Action pleaded, for the Discontinuance will relate only



only to the Time of its being entered on the Record; so that upon Nul tiel Record it will be against the Plaintiff.

Carthew 187.

1 Show. 255.

If a Plaintiff demur in Bar, to a Plea in Abatement, the Suit is discontinued, because the Demurrer in Bar is no Answer to the Plea in Abatement; and a Discontinuance in Part, is a Discontinuance of the Whole;

See Continuance.

## DISSEISIN.

Anonymus. Trin. 3 Ann.

1 Salk. 246.

1 Sid. 385.

Co. Lit. 181.

a.

1 And. 134.

1 Leon. 210.

2 Leon. 147.

Ow. 96.

Per Holt C. J.

**A**

Bare Entry, without an Expulsion, makes such a Seisin only, that the Law will adjudge him in Possession that has the Right; and so are the

Words *Intravit & fuit inde seisit'* prout *lex postulat*, to be understood in special Verdicts. But it will not work a Disseisin or Abatement, without actual Expulsion.

## DISTRESS.

— *versus* Goudier. Mich. 11 W. 3.

(1.)

Cases W. 3.

321.

**A.** Abowed as Bailiff for Rent; his being Bailiff is not traversable. Per Holt C. J.

Vasper *versus* Eddows. Pasch. 12 W. 3.

(2.)

1 Salk. 248.

**T**HE Plaintiff distrained a Beast Damage-feasant, and put him in the Common Pound, from whence the Beast escaped without his Assent, he not being satisfied for the Damage; then the Plaintiff brings Trespass for breaking his Close, and treading down his Grass, &c.

Holt C. J. There was a Time when the Plaintiff could not have any Action for this Trespass, that is, while the Beast was in the Pound, and it was the Plaintiff's Fault to put him in a Pound which could not hold him; also it is the Distrainer's Pound. If a Distrainer dies in the Pound, the Action revives, for the Distrainer failed by the Act of God; 'tis otherwise where it escapes, especially unless it be made to appear that the Plaintiff was in no Default, which is not done here; and his own Default ought not to entitle him to another Action or Remedy, and thereby subject the Defendant to a double Punishment for the same Cause.

1 Roll. Abr.  
879.  
Yelv. 96.  
Cro. Jac. 147.

If a Distrainer for Damage-feasant dies in Pound, or escapes, the Party shall not distrain de novo, but if it were for Rent, in either Case he may distrain de novo. Escape of Cattle out of Pound is not like Escape of Prisoner out of Gaol; for if the Pound be not good, the Distrainer may be his own Keeper, and put them in his own Pound, but he cannot be Keeper of his Prisoner. Every Pound-keeper is the Servant of him who impounds the Cattle, pro hac vice; by Holt C. J.

Pasch. 12  
W. 3.  
Cases W. 3.  
397.

See Leases.

## DISTRIBUTION.

Brown *versus* Shore. Pasch. 1 W. & M.

**M**otion for a Prohibition on this Suggestion, that the Administrator of one dying intestate before Distribution, sued for the Intestate's Share; and that no Right was vested, but only a Power, and Direction to the Ordinary to distribute, and consequently it must be to the next of Kin at the Time of the Decease, and not at the Time of the Distribution.

(1.)  
1 Show. 2, 25.

In another Term. Holt C. J. It gives a present Interest; the Act of Parliament is the same as if the Party had made his Will to this Effect. The common Case of a residuary Legatee, who dies before Probate, his Executors shall have Administration, and not the next of Kin to the first Testa-

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tor;

tor; that proves this Case. A Right of Action, or Chose in Action will go to Executors. The Proviso for a Year is to save the Administrator from a Devastavit, by not dividing till he sees the Estate. As to Newton's Case, a Man having only one Child dies, whether that were within the Meaning of the Statute? They hold that he needed not the Aid of the Statute, but had all at the Common Law; and I doubt the Law as to that Case, for I think it an Interest vested.

Dolben J. I wonder that it was ever made a Point. Suppose the Proviso that gives a Year had been left out, what then?

Gregory J. of the same Opinion.

Eyres J. The Design of the Statute was to make a Will for the Intestate. Consultation per totam Cur.

*Brown versus Brown, and Brown versus Farndale.*  
Trin. 1 W. & M.

(2.)  
Com. 112.  
1 Show. 1.

**I**N this Case three Points were resolved,  
1. That a Brother of the Half-Blood shall have an equal Share in the Distribution of the Goods of the Intestate within the Statute, according to the Case of Story and Hawkins, and Smith and Tracey, Mod. 209. And where it hath been said, that he shall not have an entire Share, but only a Moiety of it, that was exploded as a Fancy. And Dolben said, the Lord Hale was of the same Opinion in that Point.

2. Each Party hath such an Interest in his Share before Distribution, that if he dies, it shall go to his Executor; for the Act hath made it as if the Intestate had made his Will, and by such Words in a Will, without Doubt, an Interest vests.

3. Although the Party to whom Distribution ought to be made dieth within the Year, that shall not alter the Case; for the Proviso which gives Time to make the Distribution is only for the Administrator and Creditors, to the End that the Debts should be the better known.



Pett *versus* Pett. Trin. 12 W. 3.

**M**otion for a Mandamus to the Ordinary to make Distribution on 22 & 23 Car. 2. cap. 10. the Question was, whether the Brother's Grandson should have a Share with the Daughter of the Sister of the Intestate? It was urged, that this Act was a remedial Law to prevent the Mischiefs of Administrators sweeping away the whole personal Estate, and therefore to be taken largely; sed non allocatur, per Cur'; for Brother's Children are the Children of the Intestate's Brother; for the Intestate is the Subject of the Act; it is his Estate, his Wife, his Children, and by the same Reason, his Brother's Children, for he is equally the Correlative to all. Vide 1 Vent. Tracy's Case, in which Holt C. J. said, a Consultation was at last awarded.

Note; The Statute of Distributions is in a great Measure borrowed from the 118th Novel of Justinian.

(3.)  
1 Salk. 250.  
Ray. 498.  
3 Mod. 58.  
1 Vent. 307.  
316, 323,  
328.  
1 Mod. 209.  
2 Mod. 204.  
2 Lev. 173.  
2 Vent. 317.  
3 Keb. 669.  
2 Jo. 93.  
Styl. 174.  
All. 36.  
Moll. 316,  
369.

## D O N A T I V E.

Ladd *versus* Widdows. Mich. 1 Ann.

**M**otion for a new Trial in a Quare Impedit, where in the Point in Issue was, whether the Church was Donative or Presentative? Evidence was pretended of several Presentations.

2 Salk. 541.

And the Court, viz. Holt C. J. and Powell J. held, That though a Presentation might destroy an Impropriation, yet it could not destroy a Donative, because its Creation was by Letters Patent, whereby Land is settled to the Parson and his Successors, and he to come in by Donation.

D O W E R.

## D O W E R.

Lord Gerard's *Cafe* in B. R. on Error. Mich.  
7 W. 3.

5 Mod. 64.  
S. C. 3 Lev.  
401.

1 Salk. 54,  
233.

Vide Co. Lit.

30. b. 31. b.

Glanv. lib.

6. cap. 1.

Bract. lib. 2.

fol. 92, 93,

96.

Heta, lib. 5.

cap. 22, 23.

Brit. cap.

101, 103.

**L**ADY Gerard brought a Writ of Dower, and demands the third Part of a capital Messuage called Bromley Hall. Defendant pleads, That Cline out of Memory, it hath been called as well by the Name of Gerard's-Bromley as Bromley-Hall, of which Sir Thomas Gerard Knight was 1 Jac. 1. seised in Fee, and was by the same King James created Lord Gerard of Gerard-Bromley, he being resident and commorant with his Family in the said capital Messuage; and the said Messuage then became Caput Baronie sue, and derives the Title of the Messuage and Barony to himself by divers Descents, and demands Judgment if she shall be endowed of it; and avers, that he had assigned to her the third Part of his other Lands, &c.

The Demandant demurs generally; the Court of Common Pleas gave Judgment for the Demandant. Error is brought in B. R.

Counsel for the Plaintiff in Error argued, that this is an erroneous Judgment. The Reason of the Judgment in the Common Pleas was, that now there is no such Thing as Caput Baronie; but at this Day there are many Capital Baronies, and they are exempted from Dower. 1 Inst. 31. b. Bract. Lib. 293. Fitz. tit. Dower 80. 4 H. 3. Rot. 7. Brit. 247. Dugdale's Summons to Parliament. Of the capital Messuage the Wife shall be endowed, si non sit Caput Comitatus five Baronie. And that this Privilege is personal, appears 1 Inst. 16. 2 Inst. 9. Selden's Tit. of Honour 552, 557. The ancient Way of creating Baronies is altered: The King seldom creates a Baron, and gives Manors, &c. ad sustentandum nomen & onus, (viz.) to give him Lands to hold of him in chief, but grants an Annuity.

It is objected, that where a Woman is once intitled to Dower, the King cannot deprive her of it; yet he may do it obliquely, by this Means of making a Barony: So the King cannot exempt a Man from Arrests, yet he may create

a Man a Nobleman, and then he shall be exempted from all Arrests, and from serving on Juries.

Another Objection is, that she shall have an Equivalent, but that is absurd; for either she has a Right, or not; if she has a Right, there needs no Equivalent.

As for the Recompence in lieu of this Dowry, she has the Honour of being a Countess; and there are many Women in England that would be contented to lose a great Part of their Dowry to be made Countesses.

Then this Judgment is ill, because of the double Amerciament that is laid on my Lord Gerard; 5 Rep. 58. Specot's Case, one shall not be twice amerced in one Action against one and the same Tenant, where the Defendant pleads several Issues, and they are found against him.

Wright Serjeant econtra. These Pleadings do not shew how this House was made Caput Baronie. It is shewed that Sir Thomas Gerard was made a Baron, but not that there was any Barony made; and there may be a Baron without a Barony; Magna Charta, cap. 2. 2 Inst. 9. There it is said, that the Heir of a Baron shall pay no Relief, unless he had a Barony. The legal Constitution of a Barony is, when the King creates certain Lands to be a Barony, and they were Castles fit for the Defence of the Realm. Because Sir Thomas Gerard was made a Baron, must therefore his House be a Barony, and his Wife deprived of her third Part of it, to which she had once a good Title? Coke saith in the Chapter of Dowry, the Wife shall be endowed of all Possuages, and this is one.

As for the Indecency, that the Wife might convert her third Part to an Inn, or introduce Inmates, &c. the same may be said of a Commoner, but was never any Objection. As for the Authority of 1 Inst. it is not Lord Coke's own Opinion, but only cited as the Opinion of those ancient Authors. It is said in the Comment of Magna Charta, that the Wife shall have her Quarentine in the chief Seat of her Husband, nisi sit Castrum or Caput Baronie; so that they are the same, for their chief Seats were frequently Castles; and in such Case she should not have been endowed; but where she shall have her Quarentine, there she shall be endowed, that is a Rule. As for the double Amerciament, it is true, a Man shall not be twice amerced for the same Thing, but here the Demand is of two several Things; 1st, Of the Hundreds and Rents, upon which Judgment was presently given. 2dly, For the House, and upon this Lord Gerard has specially pleaded, and we have Judgment



on the Demurrer to that special Plea. I pray Judgment may be affirmed.

Holt C. J. What is the Barony? It is not because it is the chief House; Baronies were anciently out of Places. A Barony is when the King gives Lands or Rents to the Person he designs to make a Baron, and those he is to hold per Baroniam; and in such Case something might be said to exclude a Woman from Dower; for there were Castles also generally granted to do Service to the King; but since the Time of R. 2. that Barons have been created by Patents, there have been few Baronies made.

Then how can this House be made a Barony, that was always in the Families of the Gerards? and here it was no Castle neither.

Rokeby J. When a Barony was granted anciently, there was a Castle with a Territory also granted. Suppose there be a Barony of Stafford, and all the Houses in the Town belonged before to the new Baron, which House shall be Caput Baronie?

Holt C. J. As for the double Amerciament, there may be several Amerciaments for several Offences. The Reason of the Amerciament is the Delay, and if the Defendant comes in at the first Day, it must be entered of Record, or it signifies nothing. Suppose there be an Action brought on two Deeds, and Non est factum pleaded to one, and a Special Plea to the other, and Judgment for the Plaintiff in both Cases, certainly here shall be several Fines, if they enter several Judgments. It is true, if they enter but one Judgment, there shall be but one Capiatur. So it is of Actions of Assault and Battery against two, and the one justifies, and the other confesseth the Action.

Judgment was affirmed.

## EJECTMENT.

Hannam *versus* Woodford. Mich. 3 W. & M.

**I**N Ejectment the Case was, the Conusee of a Statute (1.) extended it, and a Liberate was returned, and Posses-  
Skin. 300,  
301.  
 sion of the Land given; after which the Conusee assigns, but the Tenant continues always in Possession, and the Conusee never actually entered, but only the Liberate was returned executed. And the Question was, if this amounted to such Possession, that the Assignment was good? Or if the Continuance of the Possession as before, had put the Conusee's Estate to a Right?

Holt C. J. There ought to be an actual Entry by the Conusee, and Continuance of the Possession by him; it is true, the Liberate being returned executed, this is an actual Possession in Law, as on the Return of a Habere facias seisinam upon a Recovery, the Parties are estopped to say the contrary. But when he who was in Possession continues it, this amounts to an Ouster, which turns the Estate of the Conusee to a Right; and the present Case differs from that of an Assignment of a Lease for Years on a Mortgage, for there the Mortgagee is as it were Tenant at Will, and his Possession is the Possession of the Assignee; but it is not so here.

Knight *versus* Syms. Pasch. 4 W. & M.

**E**jectment of five Closes of arable and Pasture, called —, containing twenty Acres in D. upon Not Guilty pleaded, Verdict for the Plaintiff; Judgment was arrested, because Ejectment lies not of twenty Acres, arable and Pasture, without shewing how much of the one and how much of the other; and Clausum does not help the Plaintiff. Clausum is not a known Measure in Law, and the adding a Name to the Close is nothing.

And Holt C. J. affirmed Savill's Case for Law. Vide  
 2 Cro. 435. contra.

(2.)  
 1 Salk. 254.  
 Carth. 204.  
 4 Mod. 97.  
 Show. 338.  
 11 Co. 55.  
 11 Co. 25. b.  
 Heil. 146.  
 Lit. Rep.  
 301.  
 Palm. 413.  
 Cro. El. 339.  
 Ow. 18.  
 Styl 194.  
 1 Sid. 229.

Stokes *versus* Berry. Assises, Anno 1699.

(3.)  
2 Salk. 421,  
423.

**I**T was ruled by Holt C. J. in this Case, If A. has had Possession of Lands for twenty Years without Interruption, and then B. gets Possession thereof, upon which A. is put to his Ejectment; here tho' A. is Plaintiff, yet the Possession of twenty Years shall be a good Title in him, as if he had still been in Possession: For a Possession for twenty Years, is like a Discent, that tolls an Entry, and gives a Right of Possession, sufficient to maintain Ejectment. And where two Men are in Possession of Lands, the Law will adjudge it in him who hath the Right.

Underhill *versus* Durham. Trin. 11 W. 3.

(4.)  
1 Salk. 256.

**T**HE Plaintiff moved, that the Landlord might be joined a Defendant with the Tenant in Possession; but it was denied, for the Court cannot compel him without his Consent; otherwise if he request it himself. In another Cause, a Motion was made on Behalf of the Landlord, that he might be made a Defendant, and the Plaintiff opposed it, because he was a Parliament-Man.

Per Holt C. J. He must be joined, and we cannot compel him to waive his Privilege.

Little *versus* Heaton. Assises, Anno 1702.  
1 Ann.

(5.)  
1 Salk. 259.

**E**Ejectment is brought against a Lessee by the Lessor, on a Condition of Re-entry for Non-payment of Rent; and upon the Trial, it was insisted, that an actual Entry and Duffer was necessary.

1 Sid. 223.  
1 Saund. 349  
3 Keb. 218,  
282.

Holt C. J. The Law indeed has been held so, and accordingly it was practised 'till the twenty-fifth Year of King Charles II. when in a certain Case the Lord Hale ruled the Law to be otherwise, and held that the Confession of Lease, Entry and Duffer was sufficient; and so it had been adjudged ever since. But suppose an Entry is requisite, to compleat the Title of the Lessor of a Plaintiff in Ejectment; I take it that Entry is not confessed by the general Rule, but only the Entry of the nominal Plaintiff; and there-



therefore in such a Case, the Plaintiff must prove an actual Entry by his Lessor.

Withers *versus* Harris. Mich. 1 Ann.

There was a Judgment in Ejectment upon conditional Terms, that there should not be Execution till a Year and a Half after; and whether this Judgment could be executed, without suing out a Writ of Scire facias, was the Question? (6.)  
Farrell 64,  
67.  
1 Salk. 259.

Holt C. J. At Common Law, if one had a Term of twenty Years to come, and were turned out, his Remedy was Ejectment: And as Assise or Writ of Right lay for a Disseisin of the Fee-simple or Freehold, so Ejectment was his Remedy when ousted of his Term; and a Recovery in Ejectment bound the Term and Right of it. Now as to the Possession of the Land, an Ejectment is real; and being the only Action of a Termor for Years, wherein if he recovers it binds the Right and Interest of him that has the Inheritance, and makes a Title in the Plaintiff; therefore a Scire facias is as necessary in this as in any real Action: And in Scire facias on a Judgment in Ejectment, he who hath the Inheritance cannot falsify, nor can his Heir in Fee-simple, or any one that claims under him; except the Issue in Tail, and he cannot do it in the Point tried, only in a Judgment by Default, or by shewing that the Defendant's Ancestor made but a faint Defence, and did not produce the Evidence he ought to have done. And therefore there is no Reason why this Case should differ from the general Rule of Law; but that after a Year and Day there should go a Scire facias, not only against the Defendant, but also against the Certenants. And so it was adjudged. 1 Sid. 224,  
317.

Fenwick's Case. Eodem Termin'.

THE Plaintiff's Title in Ejectment being by a Marriage, which was controverted, Motion was made to make the Lessor of his Wife a Defendant in this Action. (7.)  
1 Salk. 257.  
Farrell. 70.

By Holt C. J. It is of Right to make the Landlord a Defendant in Ejectment; for otherwise he might lose his Possession, by Combination between the Plaintiff and Tenant in Possession: And here the Court inclined to grant

the Motion, because there could be no Inconvenience, and it would make the Verdict more considerable; but nothing was done, with regard to other Reasons.

Fenwick *versus* Grosvenor. Pasch. 2 Ann.

( 8. )

1 Salk. 258.

S. C. Far. 156.

S. C. Far. 70.

121.

2 Salk. 648.

S. C. 2 Salk.

650.

**M**R. Fenwick obtained Judgment on a Verdict in Ejectment, on his Demise, against my Lady Grosvenor; she brought a Writ of Error, and pending the Writ delivered a Declaration in Ejectment to the Tenants in Possession upon her own Demise; and now the Plaintiff moved for the common Rule, and it was denied; for per Holt C.J. No Ejectment shall be brought by the Defendant after Recovery against him, till he has quitted the Possession, or the Tenants have attorned to the Plaintiff, so as he be in Possession, and the Defendant out; for if the Plaintiff gets Judgment in this last Ejectment, and the first Judgment is affirmed, then he renders it needless and ineffectual, by this riding Judgment, upon which he takes out Execution to recover his Possession. The Rule for Judgment against the casual Ejector is in the Power of the Court, upon what Terms the Court thinks fit. By Lady must shew us a different Title, or we will not grant the Rule.

5 Mod. 88,

350.

6 Mod. 18,

22, 307.

Turner *versus* Barnaby. Trin. 2 Ann.

( 9. )

1 Salk. 259.

**I**N the Proceedings in Action of Ejectment, if at the Trial the Defendant will not appear, and confess Lease, Entry and Duffer, the Course is to call the Defendant and his Attorney, if he be within the Rule; and then to call the Plaintiff himself, and nonsuit him; and upon the Return of the Posse, Judgment will be given against the casual Ejector: And then on the Rule for confessing Lease, Entry and Duffer, the Master will tax Costs; which being demanded of the Defendant, and not paid, on Affidavit thereof, the Court will grant an Attachment against him. Per Holt & Cur'.

Anonymus. Pasch. 4 Ann.

By Holt C. J. **T**he Plaintiff in Ejectment is no more than a nominal Person, and Trustee (10.)  
for the Lessor; so that if he releases the Action, or if an Action be brought in his Name for the mean Profits, and he release it, he may be committed for the Contempt. 1 Salk. 260.

And it has been held a great Abuse, that in Ejectment People make meer nominal Lessees, Persons not in rerum Natura, or at best not known to the Defendant, for thereby he may lose his Costs: And the Court said the Attorney that does so, ought to pay Costs; and in this Case for such Practice, an Attorney was put to answer Interrogatories. Mod. Cases 399.

## Entry Forcible.

The King *versus* Dorny. Mich. 12 W. 3.

**A**n Inquisition of a Forcible Entry was, That the Defendant & al' in Messuagium existens a Schoolhouse, adtunc existen' tenement' J. S. intraverunt, & eum Disseisit. expulsi. & ejecti. extratenuerunt. 1 Salk. 260, 261. F.N.B. 248.C. 5 Mod. 321, 447, Far. 123. 115, 138.

Holt C. J. Here is an Entry upon J. S. but no Expulsion expressly alledged, and the Disseisin ought to be positively charged, the Words being expelled, and disseised, they held him out, are a Conclusion without Premisses. Vide 1 Sid. 102. Possessionat. is ill. 1 Ven. 306. Disseisivit is ill, cited by Mr. Thompson, the Inquisition was quashed per Cur'. Poph. 205. 6 Mod. 195. 1 Hawk. 94. 2 Hawk. 293. 3 Salk. 169. Cumber. 70.



## E R R O R.

Strode *versus* Osborne. Intr. Pasch. 4 Jac. 2.  
Rot. 297.

(1.)  
Show. 26.

**E**RROR of a Judgment in Com. Banco directed to Herbert, of a Judgment coram nobis, and the Record is placita coram Bedingfield, and then after Issue, there is an Entry of Bedingfield's Death, and a Succedit of Herbert; Quare, If this be good? Urged per Thompson, That the Proceedings in the Cause 'till Judgment are Placita as well as the Declaration, and here is Part before Herbert.

Per Holt & ceteros held ill, because the Placit' was not before Herbert; and the Writ of Error was quashed.

Gerrard *versus* Danby. Pasch. 1 W. & M.

(2.)  
Carthew 28,  
29.

**E**RROR of a Judgment in C. B. in Debt on a Bond, with a Condition to perform Covenants in an Indenture; one was for Payment of Money, and the other were collateral; the Breach assigned was, for not paying the Money.

The Defendant pleaded the Statute of Usury; and it was moved, that the Plaintiff in Error might put in Bail according to the Statute 3 Jac. c. 8. by which 'tis enacted, That a Writ of Error shall be no Superseas to a Judgment given upon a Bond, with a Condition for Payment of Money only, &c. unless the Plaintiff in Error put in Bail, &c. in double the Sum, &c. to prosecute the Writ with Effect.

Holt C. J. This Case is not within the Statute; for that relates to Judgments given upon Bonds, with a Condition for Payment of Money only; but the Condition in the present Case is not only for Payment of Money, but to do collateral Acts: 'Tis true, the Breach assigned is for Non-payment of Money; and therefore the Case upon the Pleading is the same as if the Condition of the Bond had been for Payment of Money only; but yet this Writ of Error was allowed without Bail.

Sec 1 Lev.  
117.

Moseley *versus* Cocks. Trin. 1 W. & M.

**E**rror upon a Judgment, and afterwards the Record (3.) was removed into B. R. the Plaintiff in Error for some Time neglected to sue out a Scire facias ad audiend' Er- Carthew 40, 41.  
rores; whereupon the Plaintiff in the Original Action sued out a Sci. fa. quare executionem non; and upon two Nihils returned had Judgment, and Execution executed.

Now the Plaintiff in Error moved to set aside this Judgment on the Sci. fa. because his Errors were assigned on the Record; but upon Examination it appeared, that they were assigned in a private Manner, without any Notice given to the Defendant in Error.

Holt C. J. declared, That the Parties upon the Removal of the Record by the Writ of Error, have no Day in Court given to either of them; wherefore if the Plaintiff in Error delay to sue forth his Sci. fa. ad audiend' Errores, the Defendant hath no Way to compel him, but by suing out a Sci. fa. quare Executionem non, &c. and if upon that the Plaintiff in Error doth not plead that his Errors are assigned, but suffer Judgment to pass upon two Nihils, no Errors afterwards assigned shall prevent Execution.

The King *versus* Speke. Mich. 1 W. & M.

**E**rror brought by the Brother and Heir of Speke, to reverse the Attainder of Mr. Speke. (4.) Com. 144

Exception was taken, that he was not asked what he had to say, why Judgment should not be given against him; and perhaps he had a Pardon or some other Matter to have offered: And for this Cause the Judgment was reversed.

Fitzgerald *versus* Clanrickard. Mich. 1 W. & M.

**T**his was Error on a Judgment in the King's Bench in Ireland removed hither. (5.) 1 Show 76.

Holt C. J. If Want of a Warrant of Attorney be assign'd for Error, a Certiorari must be pray'd to certify that there is none; and if there be no Certificate, the Error falls to the Ground: And it is the same for Want of Admission

mission of a Guardian to an Infant, which is upon another Roll; and therefore you ought to pray a Certiorari in such Case, when you assign that for Error.

Clobery *versus* Bishop of Exon. Hill. 2 & 3  
W. & M.

(6.)  
Carthew 172.

**Q**UARE Impedit in C. B. and at the Return of the Summons the Sheriff returned, that the Bishop was summoned, and the Entry on Record was, that the Bishop appeared on the Day, per T. S. attorn' suum, & quod fecit se essoniri, &c. & habuit diem per essonium suum usque such a Day, ad quem diem Episcopus comperuit, and the Plaintiff primo die placiti exactus made Default; and thereupon Judgment of Nonsuit was against the Plaintiff.

Upon a Writ of Error brought, the following Error among others was assigned.

That there was no idem dies datus to the Plaintiff upon this Essoin, and for that Reason 'tis discontinued.

The Court held, that this was a Nonsuit before Appearance, and therefore would be no Bar in another Action; the Judgment was reversed for the Error above-mentioned.

Hill. 3 W. & M.

(7.)  
Carthew 295.

Per Holt C. J. **A** Writ of Error will lie on a Judgment in Ejectment quod recuperet, &c. before a Writ of Inquiry is executed, because that is only as to the Damages given in the Action.

Lampton *versus* Collingwood. Trin. 5 W. & M.

(8.)  
Carthew 282,  
283.  
4 Mod. 314.  
Comber. 325.

**T**HE Defendant here obtained a Judgment for 40l. Debt against Edward Craster and Robert Lampton, and after the Year, &c. he brought a Sci. fac. against Anne Lampton, Relict and Administratrix of the said Robert, who survived the said Craster; and on two Scire facias's he had Judgment against her as Administratrix of the surviving Debtor; Upon which Judgment, the said Anne Lampton brought a Writ of Error in the same Court, assigning Matter of Fact contrary to the Suggestion of the Scire facias.



Holt C. J. A Writ of Error will not lie in this Case; because the Fact assign'd for Error is in the Suggestion of the Writ, and not in any of the Proceedings in the Cause; therefore the Plaintiff must bring Audita Querela, and being so adjudg'd, she brought that Writ accordingly.

Winchurst *versus* Masely. Mich. 7 W. 3.

A Motion was made by the Defendant's Counsel for Leave to quash his own Writ of Error to reverse a Fine, one of the Parties to the Fine being omitted in the Writ of Error. (9.)  
5 Mod. 67.

Holt C. J. We cannot quash it on a foreign Suggestion; for how can we take Notice of any Thing, but what is on Record: 'Tis true, there was a Case in Pemberton's Time, where a Fine was levied by three Persons, and Two of them brought Error to reverse it, and the Fine was reversed; tho' perhaps the other Party had nothing in the Land. The Writ must not be quashed; but let the other Side shew Cause, why you should not discontinue: For Writs of Error may sometimes be discontinued, yet 'tis rarely done.

Hartop *versus* Holt. Mich. 8 W. 3.

IN B. R. the Plaintiff had Judgment in Debt; the Defendant brought Error in the Exchequer-Chamber, and the Judgment was affirmed; the Plaintiff sued out a Scire facias in B. R. and had an Award of Execution; hereupon the Defendant brought Error in the Exchequer-Chamber, tam in redditione iudicii quam in adjudicatione executionis. Notwithstanding all this the Plaintiff in the original Action went on, and sued out Execution; and now a Motion was made to set it aside, because it was sued out when there was a Writ of Error depending. Per Holt C. J. (10.)  
1 Salk. 264.  
5 Mod. 228.

1st, The Intent of the Statute 27 Eliz. was only to relieve upon the very Merits of the Cause, as it stood upon the Judgment, which the Justices and Barons might either affirm or reverse; but there can be no new Writ of Error after they have affirmed or reversed. 1 Vent. 36.  
2 Cro. 171.  
Hob. 72.  
1 Vent. 169.  
5 Mod. 229.  
2 Keb. 849.  
1 Mod. 79.

2dly, They held ex consequenti, that the Writ of Error could be no Superfedeas to the Execution; and that what the Plaintiff did was well, and no Contempt. Mod. Caf. 30.  
1 Salk. 321.

Red-

Redwood *and* Coward. Hill. 8 W. 3.

( 11. )  
Cafes W. 3.  
109.

**E**RROR out of the Palace Court in an Action on the Case; Error assigned, that Juratores assident damna, where it should be assidunt.

Holt C. J. And the Court adjudged either of them well enough, tho' neither of them proper.

Anonymus. Pasch. 11 W. 3.

( 12. )  
1 Salk. 264.

Holt C. J. **A** Writ of Error may be against the King without Petition; tho' antiently that was used, and was a Decency; but since 1640. Writs of Error have been made out *ex Officio*.

Wicket *versus* Creamer. Pasch. 11 W. 3.

( 13. )  
1 Salk. 264.

**E**RROR was brought on a Judgment recovered by two Persons, and the Writ of Error was allowed, but no Transcript made; one of the Defendants in Error died, and the other sued out a Scire facias quare Executionem non, and thereupon had an Award of Execution, and took the Plaintiff in Error upon a Writ of Capias ad Satisfac'. It was moved to set aside this Execution; for that the Defendant in Error was irregular, because the Record was not transcribed, &c. to which it was answer'd, that the Plaintiff in Error should have shewed the Death of one of the Defendants by Pleading to the Sci. fac. but had slipped his Time, and therefore ought not to have Advantage of this Matter without Audita Querela.

Fitzherb. 25.  
Goulsb. 171.  
Bro. 12.

Holt C. J. held, that where the Defendant had Matter, which he might have pleaded to the Writ of Scire facias, and has lost the Benefit of that by Award of Execution on the Sci. fa. returned, he is concluded for ever, and can never have an Opportunity or Means to let himself in to take Advantage of that Matter. But where it is an Award upon two Nihils returned, he may relieve himself by a Writ of Audita Querela; and the Court will save him that Trouble, and relieve him on Motion, unless there be a Release, or some such Matter of Fact, as may be tried.

This Execution was set aside by the Court.

Cutting *versus* Williams. Hill. 1 Ann.

**E**rror of a Judgment where the Declaration had several Counts, and several Damages laid, and there was but one Judgment below for the several Damages; and now it was assigned for Error, that one of the Counts was void, and there being one entire Judgment, therefore all was void, and Judgment ought to be reversed in the Whole.

(14.)  
Farrell. 154,  
155.

Holt C. J. There are but two Judgments in the Books, that favour the Opinion of reverting Judgment in Part; and I remember to have heard it debated here many Years ago; and the Court then were of Opinion, that it would be bad in the Whole: For the whole Judgment is wrong, it being for more Damages than should have been recover'd, and not for so much Damage upon one Promise, and so much upon another; if it were so, it might perhaps be several Judgments, and consequently one might be reversed without the other: But the Judgment in this Case is to recover *damna præd'*, which are the whole Damages.

Hob. 6.  
Cro. Jac. 343.  
1 Roll. Rep.  
24.  
Allein 75.

Judgment reversed in toto.

Gigee's Case. Pasch. 1 Ann.

**A** Writ of Error named the Plaintiff in the original Action by a wrong Surname, and it was moved that the Defendant notwithstanding the Writ of Error might take out Execution; here the Court held this to be a fatal Variance.

(15.)  
1 Salk. 264,  
265.

And by Holt C. J. Where a Writ of Error abates by Motion, the Defendant in Error must move for Leave to take out Execution; but where by Reason of Variance the Record is not removed, he need not move the Court for Execution: At last the Record was ordered to be amended.

See Stat.  
5 Geo. 1.  
c. 13.

Andrews *versus* Lynton. Pasch. 2 Ann.

**E**rror of a Judgment by Default in Trespass in C. B. the Error assigned was, That the Person who returned the Original was not Sheriff. It was urged, that the

(16.)  
1 Salk. 265.



Cro. Jac. 359,  
597.  
1 Rol. Rep.  
53.  
1 Sid. 94.  
1 Keb. 353,  
388.

Returning was not a ministerial Act, and that an Averment lies against what the Sheriff does as an Officer, but not as a Judge. Vide Yelv. 34. 2 Cro. 12. 7 H. 7. 4. 8 H. 4. 15. 1 Cro. 421. 1 Roll. 758, 760. 2 Lev. 184, 242. 2 Jo. 125.

Holt C. J. 1st, If the Sheriff did not return the Writ, it was irregular, and you should have complained, but that should have been in Time. When a Writ comes in, the Defendant has all the Term to complain of Irregularity, and in that Time the Sheriff might have had Leave in C. B. to disavow the Return; but after the Term is slipped, and the Writ is filed, and becomes a Record, 'tis too late.

2dly, The Defendant in the principal Case admitted the Original by appearing, and not challenging the Original.

*Regina versus Foxby.* Trin. 3 Ann.

(17.)  
1 Salk. 266.  
Mod. Cases  
178, 213, 239.

THE Defendant was convicted at the Sessions for a Scold, and adjudg'd to be duck'd. She brought Error (by Leave of the Attorney General).

Mod. Caf. 11.  
1 Vent. 53.

Holt C. J. said, The Court was well enough possessed of the Cause by Writ of Error; but the best Way was by Certiorari to remove it into the Crown-Office, and then bring a Writ of Error coram nobis residen', and upon that the Course is to give a Rule to assign Error; and then to move for a peremptory Rule, and in Default thereof to have a Non Prof. and then an Award of Execution.

*Smith versus Stoneard.*

(18.)  
1 Salk. 267.

ERROR of a Judgment in C. B. after Verdict, the Plaintiff in Error assigned for Error, the Want of an Original, but did not take out a Certiorari, as the Course is, the Defendant in Error pleaded in nullo est erratum.

Et per Holt C. J. If Want of an Original be assigned for Error, and the Plaintiff in Error does not sue out a Certiorari, the Course is for the Defendant in Error to go to the Master of the Office, and get a Rule for the Plaintiff in Error to return his Certiorari; and in Case he does not get it done accordingly, the Assignment of Errors signifies nothing; but if the Defendant in Error will come gratis, and confess the Error, there need be no Certiorari returned; and as to the Objection, That there may be a

bad

bad Original in this Case, that is another Kind of Error; for when Want of Original is assigned for Error, the Court will never intend a bad Original.

Judgment was affirmed.

Barnaby *versus* Saunderson. Trin. 3 Ann.

**E**rror on a Judgment in C. B. and Want of an Original assign'd, the Defendant in Error came in gratis, and alledged Diminution, and prayed a Certiorari, and thereon a variant Original was certified; upon which he came again at the Day given, and suggested another Original of such a Term, &c. and this was objected against as irregular.

(19.)  
1 Salk. 266.  
267.  
Mod. Cases  
174.

Holt C. J. If a Record below be of Easter Term, and Want of an Original is assigned for Error, the Defendant may alledge Diminution, and then a Certiorari goes to the Custos Brevium to certify an Original of that Term; and if he certifies a wrong Original, or that there is none, then the Defendant may come and suggest, before *In nullo est erratum* pleaded, that there is an Original of Hillary or Michaelmas Term, in which Case there must go a Certiorari to the Custos Brevium to certify that, and another to the Chief Justice of the Common Pleas to certify the Continuances: Also he said, if a wrong Original be certified of the same Term the *Placita* is of, it has been held the Defendant may suggest there is a right Original even of that very Term; and when they are both brought in, the Court will apply the Record to that which is good.

3 Leon. 106,  
107.  
2 Cro. 279.

Carleton *versus* Mortagh. Trin. 3 Ann.

**I**n Error of a Judgment in Debt by Confession, the Want of Original was assign'd for Error; the Defendant pleads a Release in Bar; whereupon the Plaintiff in Error demurred, and the Defendant joined therein: And the great Question was, whether the Court *ex officio* could award a Certiorari that it might appear to them if there were an Original or not?

(20.)  
Mod. Cases  
206, 208.  
1 Salk. 268.

Holt C. J. In my Opinion we cannot do it, because the Question is not whether there be Error or not; but whether the Plea in Bar be good as pleaded. When Error is assign'd, and *In nullo est erratum* pleaded, or a Default is made,

Hob. 164.  
Keb. 225.  
1 Cro. 84.  
Moor 700.  
Noy 83.  
1 Sid. 39.  
2 Keb. 27.  
2 Lev. 234.

made, there the Matter of Error is the Question before the Court; but here the Matter put in our Judgment is, if the Plea be good or not; so that now we are determining another Question than is in Judgment before us: In Done and Smither's Case, that which was assign'd for Error, appeared to the Court to be no Error; then the Matter pleaded in Bar of that Error, tho' against the Defendant, was impertinent, because it appeared to be no Error. If an ill Plea in Bar be to a bad Declaration, or to a bad Assignment of Error, it is idle, and the Court shall take no Notice of the Insufficiency of it, but shall judge on the Record: And so in many other Cases. This is a Demurrer to the Plea in Bar, and the whole Event of the Cause is put in Judgment upon the Demurrer: When there is a Demurrer and Joinder in it, the Court is bound to give Judgment upon that; now if you award a Certiorari here, you strike the Plea, the Demurrer and Joinder therein out of the Case, and give Judgment on the Certiorari. The Want of an Original is certainly Error in this Case, which the Defendant hath confessed by his coming in and Pleading the Release; for by coming in gratis he hath prevented the Plaintiff, and hindered him from compleating his Error by Taking out a Certiorari; and therefore we must take it to be as the Plaintiff hath admitted: And the Court is not at Liberty to depart from the Point referred to their Judgment.

Powel J. and the Rest contra, that the Court might ex officio award a Certiorari.

Tyson *versus* Hilliard. Hill. 3 Ann.

(21.)  
1 Salk. 269.

**E**rror of a Judgment in C. B. the Declaration was Trin. 1 Annæ, and Want of an Original assigned for Error, and a Certiorari was awarded, and the Original returned with the Continuances, by which it appeared the Declaration was Hill. 13 W. 3. with Imparances, till Trin. 1 Ann. and the Original of that Term, so that it appeared to be a Suit pending in the Common Pleas before any Original. Vide 1 Lev. 69. 1 Keb. 177, 197, 238, 377. Yelv. 108.

Holt C. J. The Certiorari as to the Continuances was impertinent, and so is the Matter returned, and as to the Rest, the Return is impossible, and contrary to the Record; and therefore the Imparances shall be taken to be in another Cause. Vide Style 293. Judgment affirmed.



Bradell *versus* Sawbridge. Hill. 4 Ann.

**T**his Case was this Day argued by Serjeant Parker, (22.) who held the Writ of Error could not reverse the Judgment given in this Case, it being to remove the Judgment given against A. B. and C. being ad grave damnum of A. B. C. whereas the Judgment was several against them upon a Scire fac'. Upon a joint and several Recognizance of Bail in C. B. 'tis true Judgment for the Costs against them was joint; so I do not see how possibly we could bring any Writ of Error to reverse these Judgments, as this Case is, there being a joint and several Judgments against the same Parties, unless we might bring a Writ of Error to reverse the joint Judgment for the Costs, and several Writs of Error for the Judgments.

Where a Writ of Error shall be reckoned variant, and where not, and what Judgment shall be given if the Judges of a Court differ

Dec for the Plaintiff: The Writ of Error is good, for I do not know any other that could be in this Case, and he said Recognoverunt is a Term or Word of Art for acknowledging a Debt by Recognizance; if the Words were recognoverunt se debere; & de bonis & catallis suis levare, this had been good, and this is the same Thing in Effect, the Recognizance needed not to have been set forth in this Case; and if the same be here amiss set forth, 'tis not material: There was a Case in this Court, Mich. 10 W. 3. between Hunt *versus* Rawson, which was,

Hunt brought a Writ of Error on a Record of a Trespass by the Defendant, and the Record it self was Transgr' done by the Defendant, simul cum B. and held the Record was well removed, notwithstanding the Variance. To this Parker replied, That in that Case there was no Proceedings against B. and so differs from this Case, and here there should be a joint and several Writ of Error, according to the several Judgments.

Holt C. J. If an Appeal of Murder be brought against three Persons, they may all join in a Writ of Error, for 'tis ad damnum ipsorum respective, and yet the Attaint of one is not the Attaint of the other Two.

Powell says, That the Reason thereof is, that it is but one Record, but I do not like recognoverunt levare de bonis & catallis, it should be levandum.

Holt C. J. Solvi & solvendum, levare & levandum, is the same in Effect, and so well enough, and this is a sufficient Description; to which Gold accorded.

Holt C. J. and Gold J. thought the Writ of Error well enough.

Powell and Parker thought it a Variance, therefore the Writ stood, and Judgment was affirmed.

### Lynch *versus* Coot.

(23.)  
3 Salk. 144.

Where the Plaintiff in Error lies still after a Writ of Error brought, according to Holt C. J. this is no Discontinuance; but the Defendant in Error hath no other Way but to bring a Scire facias against him, to shew Cause Quare executionem non haberet; and it will be no Plea here for the Plaintiff to say, that there is a Writ of Error depending, for he must assign his Errors forthwith. And in this Case there is a Difference made, viz. if the Sci. fac. is entered on the same Roll with the Writ of Error, then he may assign Errors without a Scire facias ad audiendum Errores; but otherwise he may not do it.

### Knoll's Case.

(24.)  
3 Salk. 145.

By Holt C. J. It is beneath the Dignity of the House of Lords, (which is the Supreme Judicature) to try Matters of Fact in any Actions; and for that Reason Errors in Fact, of any Judgment in this Court, must of Necessity be redressed here, and not in Parliament.

Although a Writ of Error to reverse a Judgment forecloses and ties up the Hands of the Court, yet it doth not alter the Right of the Parties: And if a Writ of Error is brought, and no Record certified at the Day of the Return, the Defendant in Error taking a Certificate of this Matter from the proper Officer where the Writ is returnable, may take out a Writ De executione judicii of Course; and the Plaintiff in Error cannot prevent Execution thereupon, without he brings a new Writ of Error.

See Abatement, Amendment, Copyhold Estates, and Courts.

## E S C A P E.

Buxton *versus* Home. Mich. 2 W. & M.

**A**ction of Debt was brought on a Judgment; the Defendant pleaded, that he was taken in Execution, and voluntarily permitted to escape, and the Plaintiff consented to it. The Plaintiff replies, that he did not consent, &c. to which the Defendant demurs, and the Plaintiff joins therein. (1.) 1 Show. 174, 177.

Holt C. J. An Action of Debt doth lie, though perhaps not a Scire fac. And the Court agreed, that the Sheriff could not take the Party Defendant again, but against the Plaintiff it is no Bar. It has been held, that if a Defendant escaped with the Permission of the Gaoler, the Execution against him is entirely gone and extinguished, and the Plaintiff, at whose Suit he was taken, shall never resort to him that escaped, but shall hold himself to the Gaoler for his Remedy: But if he escapes of his own Wrong, the Gaoler may retake him, till the Plaintiff hath made his Election, whether he will sue him or the Party. And in Alan-son and Butler's Case, which is true Law and settled, it was adjudged, that on Escape against the Will of the Sheriff, either the Plaintiff or Sheriff may retake the Defendant; on Escape with Consent of the Gaoler, the Plaintiff hath only Remedy to take, not the Sheriff; and if with the Consent of the Plaintiff, then neither he nor the Sheriff can retake the Party escaping, though the Debt be unsatisfied. The Counsel who advised the Demurrer here knew not then of this last Case. 2 Leon. 119. Car. 2.

The Court gave Rule for Judgment for the Plaintiff.

The King *versus* Fell. Hill. 10 W. 3.

**A** Man being in Custody of the Defendant, who was Keeper of Newgate, charged with High Treason, he negligently suffered him to escape; whereupon two Indictments were preferred against him: And it was objected, that the Warrant of Commitment ought to have been set forth, which was not done; for that he might be charged with High Treason, and not committed for it. (2.) 1 Salk. 272. 5 Mod. 414.

Holt



1 Roll. Abr.  
806, 809.  
Dyer 66.  
Cro. Jac.  
588.  
14 E. 3. 10.

Holt C. J. 'Tis not enough to say, that he was charged, but he must also be said to be committed for High Treason; for if a Person be in Custody for Trespass, and another should go before a Justice and swear High Treason against him, so that he is in Custody, and also charged with Treason; yet in that Case the Gaoler is not liable, as he would have been if he had been committed for Treason. The Prisoner is in Custody both of the Gaoler and the Sheriff; and if he be committed to the Sheriff, and the Gaoler suffer him to escape, the Gaoler is punishable; for the Sheriff shall answer civilly for the Faults of his Gaoler, but not criminally. And if there were a Pardon, the Sheriff or Officer cannot take Notice of it 'till it is allowed in this Court, and before such Allowance, to permit an Escape is criminal.

Judgment was arrested.

### Jackson *versus* Humphreys. Trin. 5 Ann.

(3.)  
1 Salk. 273,  
274.

ESCAPE against the Sheriffs of London; the Plaintiff declared that he levied a Plaint in the Sheriff's Court against J. S. being then in the Counter, in Custody on a former Plaint levied against him by J. N. and that the Defendant being so in Custody was suffered to escape. The Defendant demurred, and insisted that there ought to have been a Precept sued out on the latter Plaint, on which the Sheriff might have returned a Capi; as if H. is arrested by the Sheriff ad sectam A. and afterwards another Writ is delivered ad sectam B. he is now in Custody for B. and the very Delivery of the Writ to the Sheriff was an Arrest in Law.

9 Co. 88.  
Cro. Jac. 473.  
8 Co. 126.  
1 Roll. Abr.  
810.

Holt C. J. having looked on Mackally's Case, said, that upon entering a Plaint in the Counter, there never is any Precept awarded, but the Serjeant of Bace arrests the Party by his general Authority; and therefore there is nothing more to be set forth than is set forth in this Case; for by entering the Plaint, and charging the Defendant in the Counter, he is in actual Custody of the Sheriff.

Vide Commitment.

## E S T A T E.

Countess of Bridgwater *versus* Duke of Bolton.  
Hill. 2 Ann.

**U**PON a feigned Issue out of Chancery, to try (1.) whether the late Duke of Bolton did by his last Will devise certain Fee-Farm Rents to J. Earl of Bridgwater in Fee; on a Special Verdict it was found, that the said Duke at the Time of his Death was seised of several Mines, Lands and Fee-Farm Rents; and after devising his Lands and Mines, he gives all other his Estate real and personal to J. Earl of B. his Executors and Assigns, to be given by him to his Children, &c.

Holt C. J. The Rents pass by these Words, all other his real and personal Estate; and the Word Estate is Genus Generalissimum, divided into Estate real and personal: And as real Estate is divided into an Estate real in Fee, or for Life; so personal Estate is branched into Chattel real and Chattel personal, the first because it has a real Extraction. A Man seised in Fee makes a Lease for Years, the Lessee has a Chattel real, for his Estate is derived out of a real Estate, but still it is not a real Estate, which cannot be, without a Freehold at the least do pass. 'Tis true, the Word Estate comprehends both Freehold, and Chattels real and personal; and by a Devise of a Man's Estate real and personal, a Freehold passes, if these Words come not accompanied with others which express a Species of an inferior Nature, and which only can extend to a Chattel; and there 'tis said the Generality of this Word Estate, shall be restrained and explained by the precedent particular Words. Then it is objected, that this Clause here is not only in Company with a Clause which gives no more than a personal Estate, but also devises it to him, his Executors and Assigns; and therefore coming with Chattels, and the proper Limitation of such Estates, no more than a Chattel ought to pass by them. To which it is answered, if you apply these Words in any Way, the Freehold in the Rents will pass; if a Man has a real and personal Estate, and devises his personal Estate, together with his real Estate, the one and the other pass as fully as if there were express

Mod. Caf.  
106, 107,  
108.

1 Roll. Abt.  
854.  
Style 493.  
2 Cro. 46.  
1 Saund. 160.  
2 Saund. 411.  
Hob. 174.  
Moor 880.  
1 Inst. 9.  
6 Rep. 16.  
Cro. Eliz.  
378.  
1 Bulst. 75.  
Palm. 392.

Words of Devise or Grant to both of them: And there is no Difference between where Words are particular, and where they are general, if the general Words cannot be satisfied without passing the real Estate, as here they cannot. If a Person be seized in Fee, and devises his Estate, the Inheritance shall pass without any other Circumstance to manifest his Intent, merely by devising his Estate; without this Construction, the Words of the Will cannot stand; and Estate generally implies a Fee-simple: And in this Case, the Fee of the Rents passes at least the whole Estate of the Devisor, for all his Estate is a Description of his Fee. In a Devise the Testator is not tied up to Form, 'tis enough that he expresses and signifies his Meaning by any Words. Indeed in Grants it would not pass a Fee, because the Law appoints, that let the Intent of the Parties be ever so fully expressed and manifested in a Grant, without the Word Heirs, a Fee-simple shall not pass. But here is a Devise of the Fee-Farm Rents, to make thereout such annual Payments as the Devisee pleases, and make Provision for his younger Children; now if only an Estate for Life had come to the Devisee, the Security of Payment of the Annuities must be diminished; and it cannot be intended but the Devisor meant the Security should continue as long as they were to be paid. And in all Cases, where Lands are devised to a particular Purpose, and the Death of the Devisee might prevent it; there an Estate in Fee will pass.

By the whole Court, the Plaintiff had Judgment.

## E S T O P P E L S.

*Trevivian versus Lawrence.* Pasch. 3 Ann.

3 Salk. 151,  
152.

**I**N Ejedment, on a Special Verdict found of the Matter in Controversy, as to Estoppels, Holt C. J. held, that an Estoppel in Pleading doth not bind the Jury, unless it works upon the Interest of the Lands; but where the Estoppel works on the Interest of the Lands, it runs with the Land into whole Hands soever the Land comes; and an Ejedment is maintainable upon the meer Estoppel. That where a Plaintiff declares upon a Demise, which ac-  
tually



tually was by Indenture, and the Defendant pleads Nihil habuit in Tenementis; if the Plaintiff take Issue upon that Plea, the Jury may find notwithstanding the Indenture, that the Lessor had nothing in the Tenements at the Time of the Demise, and give a Verdict for the Defendant: But if he had pleaded Nil debet instead of the other Plea, and Issue were thereupon, if the Defendant give in Evidence that the Plaintiff had nothing in the Tenements, in such Case the Plaintiff may take Advantage of his Indenture by Way of Estoppel, because he could not have that Benefit of it in Pleading, as he might in the other Case. And so it is if a Mortgagee brings Ejectment against the Mortgagor, and he pleads Not Guilty, the Mortgagor shall never be allowed to give in Evidence a precedent Mortgage, he being estopped as to that by his Plea.

1 Lev. 43.  
2 Keb. 364.  
Raym. 21.  
2 Rep. 4.  
Moor 323.  
Lutw. 51c.  
1644.

## EVIDENCE.

Anonymus. *Coram* Holt C. J. at Nisi Prius at Hertford, 1690.

Holt C. J. **I**N Debt for Rent, upon Nil debet pleaded, the Statute of Limitations may be given in Evidence, for the Statute has made it no Debt at the Time of the Plea pleaded; the Words of which are in the present Tense, but in Case on Non Assumpsit, it cannot be given in Evidence, for here the Plea speaks of a Time past, and relates to the Time of making the Promise.

(1.)  
1 Salk. 278.  
Vide 2 Roll.  
Abr. 682,  
683.

The City of London *versus* Clerke. Hill. 2 & 3 W. & M.

**I**N an Action on the Case, the Plaintiffs prescribed to have a Farthing for every Quarter of Salt brought by any of the West-Country Barges to London.

Upon the general Issue pleaded, there was a Trial at Bar, at which the Plaintiffs offered in Evidence four several Verdicts obtained at Nisi Prius against four other West-Country

(2.) *Comyns Dig. l.*  
Carthew 181, 181.  
182.

Country Bailiffs; it was debated whether these Verdicts should be admitted as Evidence.

The Court allowed them to be given in Evidence, for it is as reasonable, that a Recovery against a Stranger should be given in Evidence, as Payment of the Duty by other Strangers should be proved, which was never yet doubted.

Holt C. J. A Lord of a Manor claims Suit of his Tenants ad molendinam by Custom, &c. and in an Action recovers against one Tenant, that Recovery may be given in Evidence in a like Action against other Tenants upon the above Reason, unless the Defendant can shew any Covin or Collusion between the Parties in the first Action, &c. quod nota.

*Edwards versus Thompson.* Trin. 3 W. & M.

(3.)  
1 Show. 272.

ON a Trial at Nisi Prius, Holt C. J. held, Plea Non Assumpsit infra sex annos ante impetrat' brevis original'. Repl' Assumpsit infra sex annos impetit' brevis prædict' (viz.) such a Day, &c. there in Evidence you need not shew the Original; so in a Plene administravit, where the Date is mentioned upon Record, there you need not shew it in Evidence, though it were only by Way of (viz.) ———.

*The King versus James and Thomas.* Pasch.  
4 W. & M.

(4.)  
Carthew 220.

INformation against the Defendants for Perjury, for that they swore by Affidavits filed on Record in the Common Pleas, and taken before Commissioners in the County, that they were never arrested at the Suit of T. S. who had brought an Action against them in that Court, and had Judgment by Default, and a Writ of Inquiry executed, all which they set aside upon the said Affidavits.

At the Assizes before Justice Eyre in the Oxford Circuit, the Copies of these Affidavits were proved to be examined by the Originals on the File, and were produced in Evidence by the Prosecutor.

Against which it was objected, that it was no Evidence, unless the Commissioner who gave the Oath was present, to prove that the Defendants were the same Persons who made Affidavit before him; and thereupon this Question was adjourned for the Opinion of the Court.

Et per totam Curiam, the Copies supra are Evidence sufficient, without the Commissioner who administered the Oath; for otherwise such a Perjury might be unpunishable.

Jones *versus* Bow. Pasch. 4 W. & M.

**T**Rial at Bar in Ejectment; the Question was, if Sir Robert Carr was married to Isabella Jones, by whom (5.) Carthew 225, 226. he had Issue, and under whom the Plaintiff claims.

The Defendant, by Way of Anticipation to the Evidence which the Plaintiff was about to give, moved the Court, that the Plaintiff ought not to be allowed to prove a Marriage between them, because there was a Sentence in the Arches, upon a Suit brought against her *Causa jactitationis maritagii*, by which it was decreed, that there was no Marriage between them, but that they were free one of another, and that they might marry separately, which they afterwards did.

This Sentence was now offered in Evidence by the Defendant's Counsel, as a Bar to conclude the Plaintiff from any Proof of the Marriage, unless he could shew that the same was repealed.

Upon Debate the whole Court held, that this Sentence, whilst unrepealed, was conclusive against all Matters precedent, and that the Temporal Courts must give Credit to it until it is reversed, it being a Matter of mere Spiritual Conscience.

And hereupon the Plaintiff was nonsuit.

Brook *versus* Smith. Pasch. 5 W. & M.

**I**N Assumpsit. Evidence was given that the Debt was attached by the Custom of London before the Action brought, and Condemnation had there before Plea pleaded; and it was urged, that this should relate to defeat the Action. But the Court ruled, That if an Attachment and Condemnation be before the Writ purchased, it may be given in Evidence on the general Issue, because that is an Alteration of the Property before the Action brought; but if the Attachment only be before the Writ purchased, it ought to be pleaded in Abatement of the Writ; and if the Condemnation be after the Action commenced, and before the Plea pleaded, then it may be pleaded in Bar, but shall

(6.)  
1 Salk. 280.

1 Salk. 291.  
contra.  
Co. Lit. 182.  
b. 283. a.



not be given in Evidence on Non Assumpsit; for the Property is not altered until Condemnation.

The Plaintiff had a Verdict.

Thompson & Ux. *versus* Trevanion. Mich.  
5 W. & M. *At Nisi Prius in Middlesex.*

(7.)  
Skin. 402.

Holt C. J. **R**uled upon Evidence, that a Mayhem may be given in Evidence in an Action of Trespas of Assault, Battery and Wounding, as an Evidence of Wounding. And in this Case he also allowed, that what the Wife said immediate upon the Hurt received, and before she had Time to devise or contrive any thing for her own Advantage, might be given in Evidence.

Reeve *versus* Long. Pasch. 6 W. & M.

(8.)  
Skin. 431,  
423.

**I**n a Trial at Bar, in Andrew Newport's Case, a Copy of the Book at Doctors Commons was produced in Evidence, to prove such a one to be Executor. It was objected, that it was no Evidence, because it was but a Copy of a Copy, and the Book ought to be produced, or the Will with the Probate; non allocatur; for per Curiam, it being a Will of Goods, the Act of the Court is the Original, and the Will is proved by the Act of the Court, before it is under the Seal with the Probate; and so a Copy of the Act of the Court is sufficient. But if it was a Will for Lands, there a Copy would not be sufficient, but they ought to have the Entry and Book itself; per Holt C. J.

Pride *versus* The Earl of Bath. Hill. 6 W. 3.

(9.)  
3 Lev. 410.

**E**vidence upon a Lease by Pride, tried at the Bar in B. R. before Holt C. J. and Giles Eyre only in Court. Pride made a Title to the Lands in Question, as Heir to George late Duke of Albemarle, viz. Son of a Daughter of one Monk, the elder Brother of the said Duke, supposing that Duke George died without Issue. The Earl of Bath makes Title by Deed, and also by a Will made by Duke Christopher Son of Duke George. Where to the Plaintiff said, that Christopher was not the Son of Duke George, but a Bastard, because at the Time of the Marriage of Duke

Duke George with the Duke Christopher's Mother, she had a Husband living, to whom she was lawfully married, and so her Marriage with Duke George was void, and produced several Witnesses, who endeavoured to prove this. Where-to it was answered by the Earl of Bath's Counsel, that they ought not to be admitted to give such Evidence to bastardize the Issue after his Death, and after the Death of his Father and Mother, who were married in 1653, and lived together as Husband and Wife their whole Lives after until their Deaths (without any Question made) which happened not till 1663, and also Duke Christopher during his Life was taken and acknowledged as his Son and Heir till his Death, which was in 1688, and he was styled Son and Heir of Duke George, both in the Settlement, and in the Will of Duke George, and enjoyed the Estate accordingly, and so had the Earl under him, by the Settlement and Will of Duke Christopher, till this present; also that Duke Christopher sat in a Parliament, &c. as the Son and Heir of Duke George, and so was he styled in the Patent made to him by King Charles 2. and also in an Act of Parliament made to dispose of certain Lands so settled upon him, which he could not dispose of without such an Act; and that therefore the Plaintiff should not be admitted to bastardize him after the Deaths of himself and his Father and Mother; for this Court will not permit the Ecclesiastical Courts so to do, but in such Cases have often granted Prohibitions to them, as Kenn's Case, 7 Co. and what they would not permit the Ecclesiastical Courts to do in such Matters, whereof they are the proper Judges, they themselves ought not to do. But it was answered by both the Judges, that if the Matter objected was true, the Marriage was null and void, and the Jury might (enquire and) try such Facts as would make it void; and they admitted the Evidence, and afterwards, upon a long Trial, and Diversity of Witnesses, the Jury not being satisfied with the Evidence, gave their Verdict for the Defendant the Earl of Bath. Levinz and others of Counsel for the Earl of Bath.

Fullers *versus* Forch, *Et al.* Pasch. 7 W. 3.

**T**RESPASS against Forch and other Commissioners of Excise, and their under Officers, for taking the Money of the Plaintiff by Virtue of a Warrant from the Commissioners, upon a Judgment given by them against the Plaintiff

(10.)  
Carrhew  
346.

Plaintiff, upon an Information against him for creating a new Whisky-Fat, and using it without Notice, against the Statute 3 & 4 W. & M. which was made for ordering the Duty on low Wines; and the Honey was taken for the Forfeiture given by that Statute.

On Not Guilty pleaded, and Trial at Nisi Prius, before Holt C. J. in London, this Information, Judgment and Warrant, &c. were offered in Evidence.

It was objected;

(1.) That the Copy of this Conviction was no Evidence, but that the original Book of Entry ought to be produced.

Sed per Holt C. J. The Copy may be given in Evidence.

(2.) That it ought to be proved, that the Commissioners did give the Judgment recited in the Copy of the Conviction.

Which Holt C. J. denied, because it proved itself.

(3.) That this Judgment is not peremptory, for the Plaintiff in this Action is at Liberty to disprove the Truth of the Matter of Fact, upon which they grounded their Judgment.

Sed per Curiam, that was denied; upon this Diversity, (viz.) that if the Commissioners had intermeddled with a Thing which was not within their Jurisdiction, then all is Coram non iudice, and that may be given in Evidence upon this Action; but it is otherwise if they are only mistaken in their Judgment in a Matter within their Consuance, for that is not enquirable, otherwise than upon an Appeal.

Hardres 478,  
480, 481.  
Cro. Car.  
595.  
1 Vent. 273.

### Key *versus* Briggs. Trin. 7 W. 3.

(11.)  
skin. 585.

CASE against Briggs the Marshal; the Plaintiff declared that he had commenced an Action against A. B. and that he was committed to the Custody of the Defendant, and that he being prisonarius in Custodia dict. Defendentis, the Plaintiff obtained a Judgment against him; and that he intending to charge him in Execution, the Defendant suffered him to escape, by which, &c. It was objected, that the Count is of an Escape after Judgment obtained, but the Evidence of an Escape before the Judgment; so it does not maintain the Declaration; non allocatur; for it is all one in effect; for though after an Escape the Plaintiff cannot charge him in Execution upon the Judgment, yet he might prosecute him to Judgment, as well as if he had remained in actual Custody. And this Action is not brought for



for an Escape after being charged in Execution, but for an Escape to prevent the Plaintiff charging him.

And Holt C. J. cited a Case before Bridgman C. J. where the Count was of an Escape by Baron and Feme, and the Evidence was of an Escape by one only, yet ruled to be the same Escape.

The King *versus* Haines. Trin. 7 W. 3.

**T**HIS was an Information against the Defendant, because that he being elected an Alderman of Worcester did not take the Oaths at the Time appointed by the Statutes, (which were recited) and that he acted as an Alderman after the Time incurred, within which he ought to have taken the Oaths. And upon the Trial, a Copy of the Book of the Town-Clerk in which he entered the Plaints, and the Style of the Court, &c. was offered in Evidence, to prove that he sat in Court as a Judge, and heard a Civil Cause after the 18th of January, which was the Day of the Sessions. But this was opposed as no Evidence, the Book being no Record, but Minutes by which to draw a Record; and if the Book itself was here it could not be read; a fortiori a Copy. (12.)  
Skin. 583.

Holt C. J. seemed eontra, and said, that at Huntington, before Hale Chief Justice, the Book of a Town-Clerk was read; and if the Book may be read, a Copy of the Book may be read; for in all Cases where the Original is Evidence, the Copy is Evidence; but if the Original be but a Copy, there a Copy of such Original may not be read, as a Book for Probate of a Will of Land, this is but a Copy, and therefore it ought to be produced; and a Copy out of the Book will not suffice; but a Copy of a Probate of a Will, where the Court has Jurisdiction, is good; because the Probate itself in such a Case is an original Act of the Court. But then it was said, that this is a Book in which every Person makes Entries, and not only the proper Officer; and that if the Entry in this Book shall be Evidence to charge another in a criminal Matter, any Man might be made a Criminal at the Election of another. And this appearing to be so, the Court seemed to incline that it was not Evidence, and demanded the Opinions of the Justices of the Common Pleas, who concurred that it was not Evidence.

*Steyner versus The Burgesſes of Droitwich. Mich.*  
7 W. 3.

(13.)  
Skin. 623.

ON a Trial at Bar, Camden's Britannia was offered in Evidence to prove a Custom concerning the Salt-Pits, &c. and it was insisted, that the Sayings of ancient Persons who are dead, are always allowed, and this amounts to as much as the Saying of an old Man at least; and that Camden was a publick Person, being Historiographer Royal, &c.

1 Lill. Abr.  
557.

Holt C. J. Old Historians may be good Depositors of the Reason of Laws, though the Lord Coke warns us not to rely upon them for Law; and this here is only a Copy, and although an old Manuscript, found among the Evidences of a Family, may be Evidence because it is an Original, yet a Copy would not, for it is liable to the Mistake of the Transcriber. And the Court held, that an History might be Evidence of the general History of the Realm, but not of a particular Custom. See the Case at large for more Matter.

*Sir Willoughby Aston versus Roper. At the Sit-*  
*tings at Guildhall, London, coram Holt C. J.*  
30 November 1695.

(14.)  
Com. 349.

INdebitatus Assumpsit, for Money lent, Money received to the Plaintiff's Use, & insimul computasset, and Plaintiff gives in Evidence only a Letter, whereby the Defendant promiseth shortly to pay him 30 l. which he owed him.

Holt C. J. This will not do; for it might be due upon Bond, or otherwise. It is true, a Note to pay a Sum of Money upon Demand is Evidence of Money lent prima facie, unless the contrary appear; but it is not so here.

Quer' non prof.

*Blurton and Toon. Pasch. 8 W. 3.*

(15.)  
Skin. 639.

AT Guildhall. In an Action of Debt upon an Obligation, and Non est factum pleaded, a Witness was sworn, who said that his Hand was subscribed as a Witness, but

but that he did not see the Obligation sealed and delivered. The Court demanded of him, if ever he set his hand as a Witness, but where he saw the Sealing and Delivery? he said, No; but that he never saw it. Upon which one was sworn to prove the hand of the other Witness, who was dead; which was opposed.

But Holt C. J. said, that a Man shall not lose his Obligation, because they have tampered with his Witness, and he allowed the Plaintiff to prove the Obligation by Comparison of Hands of the other Witness.

*Dockwray and Dickenson.* Pasch. 8 W. 3.

**T**ROVER for a Ship and Cargo belonging to the Plaintiff and one J. S. whom the Plaintiff survived; the Case was, that the Ship called the Anne of London, was sent upon the interloping Account to Guinea in the Year —, at which Time there were several Interlopers abroad; and the Royal African Company obtained an Order from King Charles 2. under his own Hand, directed to the Defendant, then Commander of his Majesty's Ship the Hunter, requiring him to sail to the Coasts of Africa, and to seize any such interloping Ships as he should meet with there, navigated by his Majesty's Subjects, and to bring the Ships, &c. to be proceeded against in the English Admiralty; by Colours of which Commission the Defendant seized the Plaintiff's Ship and Goods upon the Coasts of Africa. The Bill of Lading was produced in Evidence to prove the Particulars of the Cargo. And Exceptions were taken by Sir Bartholomew Shower, that though it might be Evidence against Captain Fincham himself, the Master of the Ship who signed it, yet it is not Evidence against the Defendant, who is a Stranger. Sed non allocatur; for it being proved that such Goods were provided for the Voyage, and Captain Fincham being now dead, and his hand proved, it doth not differ from the common Case, where Witnesses to a Bond are dead; it sufficeth to prove their hands, so here; for Captain Fincham would have been a good Witness himself, if living.

One that was Master of the Ship Hunter under the Defendant, was produced as a Witness.

Shower objected against him, for that a Recovery in this against the now Defendant might be pleaded in Bar to another Action against this Witness, who was Particeps criminis: But he was allowed to be a Witness, for where  
many

(16.)  
Com. 366,  
367.



many are concerned in the Taking, it becomes necessary to allow the Evidence of one of them in some Cases; as in Robbery, the very Plaintiff himself may be Evidence ex necessitate rei. Nota; Upon Reading the Bill of Lading, it was shipped for W. Dockwray and J. S. and Company. Shower urged, if others were concerned, 'tis against the now Plaintiff, who takes no Notice of the Rest.

Holt C. J. If it were so, that should have been pleaded in Abatement; you cannot take Advantage of it upon the General Issue. One Part-owner of a Ship may bring Trover for the whole Ship. It was so adjudged in my Lord Hale's Time, upon a Writ of Error of a Judgment at Chester, which was reversed, and a new Judgment given for the Plaintiff, for that very Reason.

Holt C. J. In his Direction to the Jury said, some Respect was to be paid to the Order of King Charles II. but the Command was illegal, and therefore the Subject must take Care how he executes it at his Peril. Nota; The Jury found pro Quer', and gave him above 2600l. Damages.

Worrall and Holder. Mich. 8 W. 3. At Guildhall.

(17.)  
Skins. 672.

**I**n an Action for Work done, &c. the Plaintiff gave in Evidence a Copy of a Bill delivered to the Defendant, and copied by the Order of the Defendant, and divers Exceptions were taken by the Defendant to the Bill, scil. First to the Quantity of the Work, and the others were Marks against divers Parcels, scil. O. and N. intending by it, that these Parcels were wrought for others, and not for the Defendant; and other Exceptions to the Price, and he ordered the Servant to indorse upon the Backside the Exceptions to the Quantity and Price, but to omit the Marks O. and N.

Ruled by Holt C. J. First, That this Copy of a Bill delivered was Evidence as a Copy of the Bill, and not a Copy of a Copy, and the Bill delivered is an Original as well as the Book. Secondly, That the Acceptance of a Bill delivered without Objection, but to some Particulars, is an Admittance of the Residue to be true. Thirdly, That the Ordering a Copy of the Bill endorsed, ut supra, omitting the Marks O and N, and this Copy with the Exceptions being ordered to be delivered to the Plaintiff, it is a Waiving

ing of the Exceptions signified by those Marks. Fourthly, Tho' it was objected, that this Evidence is a Confession, and therefore it ought to be taken together; yet per Holt C. J. They are not Part of a Confession, which ought to be of the same Thing, but a Caviel or Objection as to the Price or Quantity, &c.

The King *versus* Sir Tho. Culpepper. Mich. 8 W. 3.

THE Defendant having committed a Riot upon the Person of Sir F. W. in his own House, an Information was brought against him; and he produced a Witness to swear the Contents of a Letter from the Prosecutor, who deposed it was the same Hand with another Letter which had been admitted to be read as Evidence. (18.) Skinn. 673.

By Holt C. J. In the Case of a Deed lost or burnt, we will admit a Copy or Counterpart, or the Contents to be given in Evidence; but we never permit it, except it be proved that there was such a Deed executed: Now here the Witness cannot prove this Letter written, for he never had seen the Prosecutor write; and therefore it was disallowed. 1 Inst. 225  
10 Rep. 92

Lynch *versus* Clarke.

IN this Case, Holt C. J. said, That the Substance of a Deed cannot be proved, but by the Deed it self; unless it be burnt or lost, or in the Possession of the contrary Party, and then this Matter, as it happens, must be sworn, and that the Deed was executed: And here a Copy of a Fine or Recovery, is good Evidence, so as it be sworn to be a true Copy and examined; so likewise an old Deed is good Evidence, without any Witness to swear that it was executed. That where-ever an Original is of a publick Nature, and would be Evidence, if produced, an immediate sworn Copy thereof will be Evidence; as the Copy of a Bargain and Sale, or of a Deed inrolled, of a Church Register, &c. but where an Original is of a private Nature, a Copy is not Evidence, unless the Original is lost or burnt. (19.) 3 Salk. 154.

Anonymus. Hill. 8 W. 3.

(20.)  
3 Salk. 154

**A**N Action was brought, and the Statute of Limitations to be given in Evidence, and the Question was, how it should be done?

Holt C. J. Upon Non Assumpsit pleaded generally, the Defendant cannot give the Statute of Limitations in Evidence, because the Issue is joined upon what was done, and the Evidence only proves the Effect thereof to be now avoided; but upon Nil debet, the Statute may be given in Evidence, for according to that Issue there is nothing now owing.

Rex *versus* Pain. Hill. 8 W. 3.

(21.)  
Com. 358,  
&c.

**U**PON an Information for making and publishing a scandalous and seditious Libel in these Words, Mary's Epitaph, "Here lies King James's disobedient Daughter, who was addicted, &c.

The Attorney General offers the Examination of one Brereton, taken upon Oath before the Mayor of Bristol, (he being dead); but after long Debate and Conference with the Justices of the Common Pleas (by Justice Eyre); the Court would not allow it to be given in Evidence; for two Reasons.

1. It appears that the Defendant was not present when the Examination was taken. So that he could not cross-examine him.

2. There is a Difference between Capital Offences and Cases of Misdemeanor; for in Case of Felony the Justices are by the Stat. 1 & 2 Ph. & Mar. 13. and 2 & 3 Ph. & Mar. 10. to take the Examinations in Writing, and certify to them the Seal-Delivery, &c. and if the Party be dead or absent, they may be given in Evidence. Hale's Pl. Cr. 263. Indeed, in the Case of the Lord Cornwallis for Murder, it was held that Examinations were not Evidence, but that was not Right. It was agreed in that Case, that Depositions before the Coroner may be given in Evidence upon an Indictment for the King; but not in an Appeal for that Murder. In the Lord Macquair's Case in Rushworth's Collection, which was in Treason, the Information of a Witness, that could not be had, was allow'd: But in a



late Case upon an Information against Monger, the Depositions of one, whom it was suspected the Defendant had sent away, were not allowed.

It was strongly urged by the Attorney General, that before the Statutes as well as since, Justices of the Peace (and Rookby J. said, Conservators at the Common Law) might take Examination as well for Hisdemeanors as Felony; and the Attorney said, the Statutes alter not the Case as to Evidence. Sir Barth. Shower contra cited 4 Inst. 177. where Coke saith, that a Justice cannot make a Warrant to take a Man for Felony before Indictment, and (tho' that hath been over-ruled; yet) the Justices had no Power before those Statutes to take Examinations until something were depending.

Holt said, the 4 Inst. had not my Lord Coke's last Hand; the Judges have not allowed that, so much as the other Parts; tho' 2 Inst. be a posthumous Work, yet it is more perfect. He said, a Justice of the Peace may commit without Oath; but he is not wise if he doth so; for then he must make out the Cause of Commitment at his Peril; but if Oath be made he is safe.

It seemeth that the Stat. Ph. & Mar. with the Practice since, have made the Difference between Felony and Misdemeanour.

Holt C. J. If a Libel be made in Writing, and afterwards burnt, and one remembers the Contents, and dictates to another, who writes it, the Writer is Maker of a Libel. He that takes a Copy of a Libel in Writing, though he be not the Author, is guilty of making a Libel. But at the Instance of the Counsel it was found specially, that he wrote it from the Mouth of a Person unknown; and if he be Culpable of making, writing and composing, then they find him Guilty thereof, or of so much thereof as the Court shall be of Opinion he is guilty of; and as to the Publishing, Not Guilty. The Jury moved for Charges; ad quod non fuit responsum.

Sandwell *versus* Sandwell. Trin. 9 W. 3.

CASE for scandalous Words. Holt C. J. said, Where a Witness swears to a Matter, he is not to read a Paper for Evidence, though he may look upon it to refresh his Memory. But if he swears to Words, he may read it, (22. Com. 445)

it, if he swears he presently committed it to Writing, and that those are the very Words.

Dupays *versus* Shepherd. Mich. 10 W. 3. *At*  
Guildhall, *coram* Holt C. J.

(23.)  
Cafes W. 3.  
215.

CASE on a Wager, concerning the Day of the Conclusion of the Peace; and to prove it to be the Tenth Day of September, the printed Proclamation was produced; and it was objected, that it ought not to be given in Evidence, unless it had been examined by the Record enrolled in Chancery, or proved to have been under the Great Seal.

But Holt C. J. held it good notwithstanding; and that such Things as these in Print, as are of as publick Nature as a Publick Act of Parliament; and that even a Private Act of Parliament in Print, that concerns a whole County, as the Act of Bedford-Levels, may be given in Evidence, without comparing it with the Record.

Term Mich.  
11 W. 3.  
Cafes W. 3.  
344.

Holt C. J. In Trover, the Plaintiff ought to prove Property of Goods in him, and at least a Demand and Refusal; and if there be several Parcels, the orderly Way to give Evidence is to make an Inventory of them, and prove the Property of the Goods mentioned in it, and Demand and Refusal of them.

The Case was, a Captain contracted with Seamen to go on a Voyage, and after he had got them on Board, he would not pay them according to Agreement; upon which they demanded their Goods; which he refused, if they did not stay 'till he had searched for them, which he refused to do then; and this held good Evidence of a Conversion.

Mich. 11  
W. 3.  
Cafes W. 3.  
345.

An Indeb' Assump' upon a Bill of Exchange by Domingo Franca; it appeared upon the Declaration, that there were several Indorsements, and the Action was brought by the first Indorsee, who struck off the several Indorsements, and brought his Action for Non-payment; the Bill did specify Value received of the Plaintiff.

Holt C. J. If the Action had been upon the Custom, in this Case the Way had been for the Plaintiff to get the last Indorsee to indorse it to him, for him to bring Action as Indorsee. But this Action (he said) well lay, for the Bill was given as a Security for Money, and without Doubt it was a Debt.

The Plaintiff, to shew a Protest, produced an Instrument attested by a Notary Publick; and tho' it was insisted on, that he should prove this Instrument, or at least give some Account how he came by it;

Holt C. J. ruled it not to be necessary; for that (he said,) would destroy commerce, and publick Transactions of this Nature. And he said a Bill of Exchange might be accepted by Parol, tho' the usual Way be to do it by Writing; and that if a Bill be drawn upon Two; and one of them accepts it, it is an Acceptance of both.

Then it was urged, That the Declaration shews a Protest for Want of Payment, when it was in Truth for Want of Acceptance, as appeared by the Protest; yet it was ruled well; because this was not upon the Custom, but a plain Debt; and one might bring Debt or Indebitatus Assumpsit upon a Bill of Exchange, because it is in the Nature of a Security.

Original Drawer was offered as an Evidence, in an Action upon a Bill of Exchange, to prove that he did not draw the Bill, but was denied, because at last the Burden must fall upon him; but the Party gave him a Release in Court, and that was sufficient.

In Debt by Husband and Wife, against an Executor, who pleaded Plene administravit; upon Issue it was proved, that the Executor had discharged a Debtor of the Intestate out of Ludgate, taking a Bond from him for the Debt; and it appeared that he was so extream Poor that he was starving; yet the Debt was judged Assets in the Executor's Hands.

Mich. 11 W. 3.  
Cases W. 3.  
346.

Besides the Executor had not an Inventory; wherefore it was said they ought to intend Assets.

And here Holt C. J. ruled, 1st, That if Husband and Wife jointly sue for Debt due to the Wife before Marriage, and the Husband dies, and the Wife continues the Suit, the Money when recovered shall not be Assets to the Executor of the Husband. And tho' Land had been settled by Husband upon Wife in Consideration of her Fortune, of which this Debt was Part, yet he having not recovered it during Coverture, the Wife should recover it to her own Use. And tho' it was pretended that there was a Recovery in the Husband's Time, and that they would prove by the Sheriff who had a Writ of Execution; yet they having not the Judgment on which the Execution was, it was ruled they could not give that in Evidence.



Pitman *versus* Maddox. Hill. 11 W. 3.

(24.)  
2 Salk. 690.  
1 Salk. 285.

**T**HE Plaintiff being a Taylor brings an Action on the Case for Money due to him, upon his Bill delivered in; and at the Trial it was said by Holt C. J.

A Shop-book has been allowed to be Evidence, on Proof that the Servant who writ the Book was dead, and this was his hand, and that he accustomed to make the Entries; and in such Case, no Proof was required of the Delivery of the Goods: And he held, that tho' the Statute 7 Jac. 1. says, a Shop-book shall not be Evidence after a Year, &c. That is not Evidence of it self within the Year, without something more.

Mol. Cases  
248, 249.  
1 Vent. 151.  
7 Jac. 1.  
c. 12.

Anonymus. Pasch. 12 W. 3.

(25.)  
Cases W. 3.  
375.

**A**T Nisi prius coram Holt. In an Abolvy for a Rent-charge devised to the Plaintiff, he could not produce the Will that belonged to the Devisee of the Lands charged, who claimed them by the same Will; but he produced the Ordinary's Register of the Will, and proved former Payments; and held sufficient Evidence.

The Will was, I devise my Lands in the Parishes of A. and B. to J. S. and I devise a Rent to J. N. out of my Lands in the Parish aforesaid; and per Holt C. J. good to charge the Lands in both Parishes.

Adams *versus* Arnold. Pasch. 12 W. 3.

(26.)  
Cases W. 3.  
375.

**T**RESPASS for an Assault upon the Plaintiff's Wife, and getting her with Child; and what the Wife declared in her Labour rejected to be Evidence.

Holt C. J. Would not suffer the Plaintiff to discredit a Witness of his own Calling, he swearing against him.

Anonymus. Trin. 12 W. 3.

(27.)  
Cases W. 3.  
408.

**H**olt C. J. **I**F a Man contracts for Goods, and after carrying them away gives the Seller a Goldsmith's Note for the Money, it does not amount to a Pay-

Payment; but if it were given at the very Time of the Contract, it would be *prima facie* Evidence that it was taken in Payment. And if a Man, upon a Contract made before, take such a Bill; and keeps it till the Party on whom it is drawn becomes insolvent, in an Action brought by him against the Buyer upon that Bill he shall be barred, but he shall recover the Debt upon the original Contract.

Gallaway *versus* Sufach. Trin. 12 W. 3.

IN Debt for Rent, if the Defendant plead Levied by Distress, and so he does not owe it, a Release or Payment is good Evidence. Vide Cro. Eliz. 140. But if he pleads Rasure, and so not his Deed; nothing else is Evidence but Rasure. Per Holt C. J. (28.)  
1 Salk. 284.

Thurston *versus* Slatford. Mich. 12 W. 3.

CASE upon an Indebitat. Assumpsit for 5 l. received to the Plaintiff's Use, being Fees of the Office of Clerk of the Peace of a certain County; it was here insisted on by the Defendant, that the Plaintiff had forfeited his Office, by not qualifying himself according to Law, and produced the Record to prove he had not taken the Oath: The Plaintiff took Exception to this Evidence, and the Record was brought into B. R. (29.)  
1 Salk. 284.

Holt C. J. If a Judge admits that for Evidence, which is not, the other Side cannot demur for that Cause, but must tender a Bill of Exceptions; tho' this Record I take to be Evidence: And if there be a Mistake, it may be supplied and corrected by other Evidence; for the Plaintiff shall not be concluded by the Mistake or Negligence of the Officer, but still it is a Record, and some Proof, tho' not compleat, and may be left to the Jury.

Dillon *versus* Crawly. Pasch. 13 W. 3.

ERROR of a Judgment upon a Demurrer to Evidence in C. B. the Witness to the Sealing and Delivery of a Deed, being subpoenaed, did not appear; but to prove it the Party's Deed, they proved an Indorsement made by him thereupon three Years after; reciting a Proviso within, that (30.)  
Cases W. 3.  
500.

that if he paid such a Sum the Deed should be void, and acknowledging that the said Sum was not paid; and a Fine was levied of the very Lands mention'd in the Deed to Crawly, and by the Indorsement he expressly own'd it to be his Deed; and upon this the Deed was read. And now it was objected, that this was not good Evidence, because not the best the Nature of the Thing could bear; but only Circumstantial; which never ought to be admitted, where better may be had *ex natura rei*; because Circumstances are fallible and doubtful; and it is upon this Reason that a Copy of a Record is good, because one cannot have the Record it self; but a Copy of a Copy will not do. Upon *Non est factum* to a Bond, one of the Witnesses being subpoenaed did not appear; and it was offered to prove that he owned it his Bond; but denied.

Holt C. J. Can there be better Evidence of a Deed than to own it, and recite it under his Hand and Seal? Et per totam Cur' Jud' affirm'.

Price *versus* Earl of Torrington. Trin. 2 Ann.

( 31. )  
1 Salk. 285.

2 Salk. 690.  
1 Salk. 283.  
Mod. Cases  
264.

**I**N an Action by a Brewer, for Beer sold and delivered; the Evidence to charge the Defendant was, the usual Way of the Plaintiff's Dealing, viz. that the Draymen came every Night to the Clerk of the Brew-house, and gave him an Account of the Beer they had delivered out, which he set down in a Book kept for that Purpose, and the Draymen set their Hands to it, and that the Drayman was dead, but that this was his Hand; this was held good Evidence of a Delivery; otherwise of the Shop-book it self singly without more.

The Queen *versus* Mackartney & al'. Mich.  
2 Ann.

( 32. )  
1 Salk. 286.  
Mod. Cases  
301.

**T**HE Defendants were indicted for a Cheat done to J. S. by imposing upon him a Quantity of Beer mixed with the Grounds of Coffee, &c. for Port Wine; one of them pretending to be a Portuguese Merchant, and the other a Broker.

1 Sid. 431.  
2 Keb. 572.  
1 Vent. 49.

By Holt C. J. In this Case J. S. shall be allowed to be a Witness to prove the Fact upon the Trial; for in such private



private Translations, there can be no other Evidence of the Circumstances of the Fact.

Anonymus. Mich. 3 Ann.

Holt C. J. **I**N Case, in my Lord Hale's Time, a Counterpart of an ancient Deed was admitted as Evidence of the Deed, and the Special Verdict was drawn up as finding the Deed, with a prout patet by the Counterpart. By all the Court, a Counterpart of a Deed without other Circumstances, is not sufficient Evidence, unless in Case of a Fine, in which Case a Counterpart is good Evidence of it self. (33.)  
1 Salk. 287.  
1 Lev. 25.  
Mod. Cases  
225, 248.  
2 Salk. 690.  
Far. 129.  
3 Keb. 477.

Wright *versus* Sharpe. Pasch. 7 Ann.

**E**vidence was offered at the Assizes and refused; but no Bill of Exceptions was then tendered, nor were the Exceptions reduced to Writing; so that the Trial went on, and a Verdict was given for the Plaintiff: Then next Term the Court was moved for a Bill of Exceptions. (34.)  
1 Salk. 288.  
2 Inst. 427.  
F. N. B. 21.

Holt C. J. You should have insisted on your Exception at the Trial; if you acquiesce you waive it, and shall not resort back to your Exception after a Verdict against you, for perhaps if you had stood upon it the Party had other Evidence, and would not have put the Cause on this Point: Indeed the Statute appoints no Time, but the Reason of the Thing requires that the Exception should be reduced to Writing when taken and disallowed, like a Special Verdict or Demurrer to Evidence; and tho' it need not be drawn up in Form, the Substance must be taken in Writing while the Thing is transacting, because it is become a Record.

The Motion was denied.

*In Charnock's Case.*

**I**T was held per Holt C. J. That Evidence may be given of a treasonable Conspiracy, &c. at any Time, because 'tis only a Circumstance and of Form, and not material: Here it is laid to be at divers Days and Times, as well before as after; and as the Evidence may be of Matters before, so it may be of Matters also at any Time after. (35.)  
1 Salk. 288.  
4 H ter

1 Inst. 303.  
5 Rep. 120.

ter the Time specified in the Indictment, provided it be not after the Indictment was found. Nor is the Evidence tied up to the Place; for it may be of any Place, not out of the County: And so is the Law in all criminal Cases.

## E X E C U T I O N.

Heydon *versus* Heydon. Mich. 5 W. & M.

(1.)  
1 Salk. 392.

**A** Nother Person being Copartner with the Defendant, a Judgment was obtained against him, and all the Goods of both of them were taken in Execution.

Holt C. J. and the Court, adjudg'd that the Sheriff must seize all the Goods, for the Moieties are undivided; and if he seizes but a Moiety and sells that, the other Copartner will have a Right to a Moiety of that Moiety: Therefore he must seize the Whole, and sell the Moiety thereof, and then the Tenant will be Tenant in Common with the other Partner.

1 Show. 173,  
174.

See here in a like Case, by Holt C. J. Altho' Partners have joint and undivided Interests, yet only the Share or Part of him against whom Execution is sued, and no more, can be seized upon this Execution.

Smalcomb *versus* Buckingham. Mich. 9 W. 3.

(2.)  
Carthew  
419, 420.  
5 Mod. 377.

**T**here were two Writs of Fieri facias brought to the Sheriff the same Day, on several Judgments obtained against J. S. one whereof was at the Suit of Smalcomb, which Writ was delivered to the Sheriff an Hour after the other Writ of Fieri facias, but did bear Telle before it; hereupon the Sheriff made a Bill of Sale to him of the Goods of the Debtor, tho' his Writ was thus delivered to the Sheriff after the other; but afterwards, and before the Return of these Writs, the Sheriff apprehending it was Wrong, made a new Bill of Sale to the other Creditor; whereupon Smalcomb brought Trover against the Sheriff, &c.

Holt C. J. If two Writs of Execution are delivered to the Sheriff on the same Day, he has not Election which to execute first, but is bound to give Preference to that which was first delivered; yet if in fact he execute that first which was last delivered, and make Sale of the Goods, as in this Case was done to the Plaintiff, the Vendee hath a good Title to them; which cannot be defeated by a subsequent Execution of that Writ which was first delivered: But the Party, who is concerned in such Writ, is put to his Action against the Sheriff; and the Reason is for the Quiet of Purchasers under Sheriffs upon Executions, for otherwise it would be dangerous to make such Purchases of the Sheriff, and that might make Writs of Execution of no Effect.

All the Judges were of Opinion for the Plaintiff, to which they rather inclined, for that it appeared, that the other Creditor did not demand an immediate Execution of his Writ. And Holt said, tho' the second Fi. fac. was delivered a Fortnight after, if it be the first executed, it shall stand good, and the Party has only his Remedy against the Sheriff.

Clerk *versus* Withers. Mich. 3 Ann.

F. D. as Administrator of J. D. recovered 303 l. against C. B. upon a Bond to his Intestate, upon Judgment by Default in C. B. and sued out a Fi. fa. tested of Trin. 1 Ann. returnable Tres Mich. directed to the Sheriffs of London, which was delivered to the Sheriff the first of August the same Year, who on the same first of August seized Goods to the Value. F. D. the Administrator died the 9th of September following: The Sheriff returns the Seizure to the Value, Sed remanent, &c. pro defectu emptorum. The 29th of September the Sheriff is removed, and another put in. The Plaintiff, Clerk, now sues Sci. fa. against the then Sheriff for Restitution of his Goods; and upon Demurrer, Judgment against the Plaintiff in the Common Pleas, and Writ of Error. (3.) 6 Mod. 290. 6 Mod. 291, 292, &c.

The Case having been twice solemnly argued at the Bar, the Court now seriatim affirmed the Judgment.



Trin. 8 W. 3.  
 Cases W. 3.  
 99.

Holt C. J. Tho' a Writ of Error be a Superfedeas in it self, yet after Execution begun, it shall not hinder it, but the Sheriff may go on, and on a Fi. fac. sell the Goods.

See more under Error, and Sheriffs.

## EXECUTORS.

Dominus Rex *versus* Ayliffe and Freke. Pasch.  
 1 W. & M.

( 1. )  
 Show. 13.

**A**YLIFFE was attainted and executed for Treason, Freke as his Executor brings a Writ of Error; Holt at first doubted if Executors could bring it, but agreed that they, as well as the Heir, might bring it in Case of Felony, according to Marth's Case; and at last, the Court held, that there was no Difference between Treason and Felony as to this Point, and that the Executor being injured by an erroneous Attainder, might bring the Writ of Error; tho' by some, 'tis necessary to aver a personal Estate, for otherwise he is no Ways damnified; whereas an Heir is, tho' there be nothing descended to him, because of the Corruption of Blood.

Saunderson *versus* Nicholle. Mich. 1 W. & M.

( 2. )  
 Show. 81.

**I**N Debt, fully administrated admits the Debt; but otherwise in an Action on the Case, or in an Indebit. Assumpsit; for there the Plaintiff must prove the Debt; and in Proof of a Plene administravit, if the Action be Debt on a Bond, and you offer Payment of a Bond, on Plene administravit, you must prove 'twas a Debt by Bond, and that 'twas sealed and delivered; but to Debt on simple Contrasts you need only prove Payment, because if no Bond, 'tis a good Administration in that Action. By Holt C. J.

Mordant *versus* Thorold. Trin. 2 W. & M.

SCIRE facias by the Executor of a Tenant in Dower on a Recognizance, according to 17 Car. 2. to pay the mean Profits, if Judgment be affirmed. Demurrer. (3.)  
Show. 97.

Pemberton. The Exception is, that this is a Personality, and gone with the Person. I say it is become a Duty, and the Recognizance makes it such, and ascertains it was such, tho' there be a Scire facias requisite to adjust the Quantum: This is like a Covenant to pay all the Profits that should be incurred during the Suit; the Scire facias is but ancillary, an help to assist the Execution of the Recognizance.

Holt C. J. There can be no Suit on this Recognizance, till there be a Judgment for these Damages, and consequently the Recognizance doth not any Ways alter it. The Scire facias to ascertain the Damages must be as at Common Law, and the Common Law Rule is Actio personalis moritur cum persona. We can Award nothing after the Party's Death, because it doth arise ex delicto, and no Interest vested till they are assessed. Judic' pro Def. nil capiat per breve.

Hill *versus* Mills. Mich. 3 W. & M.

Motion for a Prohibition to the Ecclesiastical Court, for granting Administration to A. where B. was named Executor by the Testator, for that B. was a Bankrupt. (4.)  
Com. 185.  
1 Show. 293.

Holt C. J. The Ordinary is not to grant Administration, where an Executor is named, and Bankruptcy is no material Disability; he acts en autre droit, and the Testator hath intrusted him; but in Case of Non sane Memory there is an absolute Necessity to grant Administration.

A Prohibition granted.

Shelley's Case. Trin. 5 W. & M.

IN an Action on the Case against an Executor, for a Debt due from the Testator, upon Plene administravit pleaded, several Points were declared and settled by Holt C. J. (5.)  
1 Salk. 296.

Cro. Eliz.  
315, 515.  
Plowd. 543.  
2 Roll. Abr.  
926.  
Show. 81.

That the Plaintiff must prove his Debt, or he shall recover only 1 d. Damages, tho' there be Assets; for in this Case the Plea admits the Debt, but not the Quantity. That all separate Debts mentioned in the Inventory, shall be accounted Assets in the hands of the Executor; because that is as much as to say, that they may be had on Demanding, unless the Demand of them or Refusal be proved. And that in Strictness no Funeral Expences are allowable against a Creditor, except for the Coffin, Ringing the Bell, Parson, Clerk and Bearers Fees; and not for the Pall or other Ornament, used in such Cases.

Trin. 5 W. & M.  
M.  
Cafes W. 3.  
43.

Holt C. J. Executor may justify Payment of a Statute, when a Judgment is suspended by Writ of Error.

Harding *and* Salkeld. Mich. 5 W. & M.

( 6. )  
Skinn. 365.

**I**N an Action upon the Case against the Defendant for Goods sold, he pleaded in Bar, that he was an Executor, where the Plaintiff had charged him as an Administrator; upon a Demurrer, adjudged for the Plaintiff, for it was but in Abatement; it was said this was well pleaded in Bar, as in 5 Rep. 32. and that upon Evidence, upon Ne unque Executor, he may give Letters of Administration in Proof 305. This was denied per Holt C. J. and Eyre, ceteris tacentibus; and Holt said, that this notwithstanding, he shall be charged; but he said it is otherwise of Letters ad colligend' bona defuncti; but where one sues as Executor, the Defendant may plead by Way of Estoppel, that he was Administrator, &c. 5 Rep. 32.

Billinghurst *versus* Speerman. Pasch. 7 W. 3.

( 7. )  
1 Salk. 297.  
1 Sid. 266.

**I**F an Executor has a Term of less yearly Value than the Rent, in an Action brought in the Debt and Detinet, he may plead the Special Matter, viz. That he has no Assets, and that the Land is of less Value than the Rent, and demand Judgment if he ought not to be charged in the Detinet tantum.

1 Salk. 307.  
317.  
1 Vent. 271.  
1 Sid. 200.  
2 Vent. 209,  
210.  
1 Mod. 185,  
186.

By Holt C. J. and that Hale was of the same Opinion, and it was but reasonable, because an Executor could not waive for the Term only; for he must renounce the Executorship in toto, or not at all.

Williams



Williams & al' Executors of Mellys *versus* Crey.  
Pasch. 7 W. 3.

**A**CTION sur le Case by Executors, for a false Return of ( 8. )  
a Fi. fac. in the Plaintiff's Testator's Life-time; it Cases W. 3. 71.  
was moved in Arrest of Judgment, that no Action lay, be-  
cause it was only a personal Cozt to the Testator, and so  
not within the Equity of the Statute De bonis Testatoris as-  
portat' in vita. 4 E. 3. c. 7. cited, 1 Roll. Abr. 913. and  
Cro. Car. 297. it was adjudged that the Action well lay for  
the Executor, being within the Equity of the Statute.

And per Holt C. J. Action Sur le Case lies for an Execu-  
tor upon this Statute, for an Escape out of Execution in  
the Testator's Time; tho' it is a Doubt in the Books,  
whether such an Action lies for Executor, in Case of an  
Escape upon mean Process in the Testator's Time.

Bowyer *versus* Cook. Mich. 7 W. 3.

**T**HE Plaintiff here had mislaid his Action against the ( 9. )  
Defendant, for he was charged as Executor, when 5 Mod. 145, 146.  
he was but Administrator; which was pleaded in Abate-  
ment, and Exceptions were taken to the Pleading, &c.

Holt C. J. In an Action against an Executor, the old  
Way was to plead Nunque Executor, and Nunque Admin-  
as Executors; but this is a dangerous Way, and it is  
better to plead, that he is not Executor, but that the Bi-  
shop has granted Administration to him in this Case, and  
that proves him not to be Executor; and then there is no  
Reason that there should be a Traverse: Indeed if the  
Defendant is sued as Administrator, and he pleads that  
there is a Will, and he is made Executor, there ought to  
be a Traverse, absque hoc, that the Testator died Intestate;  
but where he is sued as Executor, and he pleads that he  
died Intestate, there needs no Traverse. The Plea here  
is much better without it; for he allows that he is charge-  
able as to the Right, but it is in another Manner than you  
have charged him, and shews it to be as Administrator,  
which is enough, being a full Answer to the Declaration:  
He need not traverse Administration as Executor before,  
when you charge him in your Declaration only generally;  
but you ought to reply, and shew what Act of Administra-  
tion

2 Saund. 97.  
190.  
Lutw. 144.

tion he had done; and at Common Law an Administrator was liable as Executor.

Page *versus* Price. Mich. 8 W. 3.

(10.)  
1 Salk. 98.

**A**ction against an Executor in an inferior Court, and Special Bail put in. It was removed by Habeas Corpus in C. B. and the Court held, he should put in Bail to appear to a new Original within two Terms, (but not after) nor to pay the Condemnation-money.

Trin. 11 W. 3. B. R. Holt C. J. said, That in all Cases where a Cause comes in by Habeas Corpus, the Defendant shall find Special Bail, save in the Case of an Executor, and that this they do in Favour and Indulgence to inferior Jurisdictions.

Ashton *versus* Sherman & Ux' Administrators of Field. Mich. 9 W. 3.

(11.)  
Cases W. 3.  
153.

**D**ebt on a Bond of the Intestate's; the Defendants plead, that Field the Intestate, 5th of July, 5 W. & M. became indebted in 100 l. to Rich. Wareing, for which Wareing had a Judgment of 100 l. and 30 s. Costs, and also a Judgment to one Axtel; and they set forth several other Judgments and Bonds, and that they have not Assets ultra. The Plaintiff replies severally to the Judgments, as to Six of them, that they were kept on Foot per fraudem, and as to the two Judgments of Wareing and Axtell, that the Defendants had Assets to satisfy him, besides Goods to satisfy Wareing and Axtell de separalibus debitis & damnis suis prædictis versus ipsos Johannem Sherman & Mariam uxorem ejus, sicut præfertur, recuperat'; & hoc petit quod inquiret' per patriam; whereupon the Defendant demurred specially, because the Replication was double; Plaintiff joined in Demurrer.

And Holt C. J. delivered the Opinion of the Court, and said, the Defendant Executor has pleaded in Bar several Judgments; the Plaintiff hath replied to them severally, which he may well do; but then he hath not done well in this. He hath pleaded to some Judgments that they were kept on Foot by Fraud; and as to the other, that he has Assets ultra; & hoc petit quod inquiretur per patriam; and concluding to the Country is naught, because the Defendant

1 Saund. 337.

dant hath confessed by his Plea already that he hath Assets ultra those Judgments. Here you have driven them to an ill Issue, which cannot be good; but because the Precedents have been this Way, as Handcock and Proud's Case, 1 Saund. 336. we will give the Plaintiff Leave to discontinue paying Costs. After which, by Consent of Parties, a Rule was given, that the Plaintiff should have Leave to amend, paying Costs.

Holt C. J. If A. employs B. to work for C. without Warrant from C. A. is liable to pay for it; an Executor is not liable to pay for Funeral Expences, unless he Contracts for it. Mich 10 W. 2. Cases W. 3. 256.

Cage and Acton. Pasch. 11 W. 3.

DEBT against an Administratrix to her Husband for Arrears of Rent upon a Lease made to him in his Lifetime. The Defendant pleaded, that before the Intermarriage between them he entered into a Bond to her, to pay so much Money to her, her Executors, &c. upon Condition, that in Case she should survive him, he would leave her worth so much Money; that he has not performed the Condition; that she has no Assets above 200 l. which is a less Sum than that which he has bound himself to pay her; and that she retained that in Part; upon which the Plaintiff demurred generally. (12.) Cases W. 3. 288.

The Points in this Case were Two: 1st, Whether Debt upon a Bond were of as high a Nature as Rent, so that an Executor might give it Preference of Payment.

2dly, Whether the subsequent Marriage were a Release of the Bond; the Court, viz. Holt, Rokeby, Turton and Gould, agreed clearly, that Rent whether upon a Parol, or Lease by Deed, was in equal Degree to a Bond, and Executor might prefer whom he pleased.

But as to the second Point in Mich. 11 W. 3. Rokeby being dead, the Court argued seriatim, and Gould and Turton held, that the Marriage did not release the Bond.

Holt C. J. held clearly, that it was extinguished by the Marriage. But this Case went afterwards into Chancery, and there the Bond was considered as a Marriage-Agreement. 2 Vern. 480.



The King *versus* Sir Richard Raines. Mich.  
12 W. 3.

( 13. )  
3 Salk. 162.

**A** Mandamus issued to admit an Executor to prove the Will of his Testator; the Bishop's Chancellor return'd, that he was a poor absconding Person, by Reason whereof he refused to grant Administration, until the Party should give Security to perform the Will, &c.

By Holt C. J. Where a Man is made Executor, he cannot be sued to Account but only in Respect of Creditors and Legatees; for the Residue is his own by the Common Law: And so it is of an Administrator, because by the Statute 31 Ed. 3. such Administrator is put in the same State and Condition with an Executor: Now as an Executor is properly an Officer, 'tis reasonable he should take a Promissory Oath, which is of common Right in all Cases of Officers; but 'tis not so to demand collateral Security, and the Ordinary cannot put Terms upon him where the Testator hath put none; for the Testator has thought him able and qualified, and he has a Temporal Right, which he cannot sue for before Probate of the Will.

1 Vent. 335.  
Show. 294.

Per Cur', A peremptory Mandamus was granted.

Carthew 458.

But hereupon a Bill in Chancery was brought against the Executor, and that Court enjoined him from intermeddling with the Assets, any further than to satisfy the Legacy given to himself; for in Equity he is but a Trustee for the other Legatees, and being insolvent ought to give Security before he enter upon the Trust.

Atfield *versus* Parker. Pasch. 13 W. 3.

( 14. )  
Cases W. 3.  
496.

**I**N an Action against an Executor or Administrator, if he plead not all his Judgments, he loses the Right of preferring them, and may be charged in a Devastavit for those Judgments he has omitted to plead; of which vide a Case well reported in Hutton — for, the Pleading of the Judgment is a Protection of the Assets which you have or may have, until the Judgment be satisfied. And if one pleads five Judgments, and one of them be false or fraudulent, you are saddled with the whole Debt. Per Holt & Gould.

Wankford *versus* Wankford. Intr. Hill. 1 Ann.

**I**N an Action of Debt upon two Bonds, the Case was briefly this; R. W. is bound to S. S. who makes R. W. his Executor, and dies; then R. W. administers several Goods, but dies before Probate; the Plaintiff takes Administration to S. S. and brings his Action on the Bonds against the Heir of R. W. And the Question was, the Obligee having made the Obligor Executor, and he having administered some of the Goods, tho' not proved the Will, whether that would amount to a Release? (15.)

Holt C. J. It is a good Release as this Case stands, for these Reasons; because by being made Executor he is the Person, that is to receive the Money due upon the Bonds before Probate; and as he is entitled to receive it, he is also the Person to pay it, and the same Person being to receive and pay, that amounts to an Extinction. 'Tis true, this Rule doth not always hold; for if the Obligor makes the Obligee, or the Executor of the Obligee his Executor, that alone is no Extinction, tho' there be the same Hand to receive and pay; but if the Executor hath Assets of the Obligor, it is; because then he is within the Rule, that the Person, who is to receive the Money, is he who ought to pay, and the having Assets amounts to Payment: But if he has no Assets, he is not the Person that ought to pay, altho' he is the Person that ought to receive it. If the Obligor takes Administration to the Obligee, tho' there be Assets, this is no Extinction, and yet in that Case the same Person is both to pay and receive; the Reason is, because an Administrator comes in by the Act of the Ordinary, but an Executor by Act of the Party himself: And where the Obligee dies, and his Executrix marries the Obligor, this will not be an Extinction of the Debt; but if a Feme Obligee marry the Obligor, it would extinguish it, because it would be a vain Thing for the Husband to pay Money to the Wife in her own Right, but he might pay it to her as Executrix. Here the Obligee makes the Obligor Executor, and he administers some Part of the Goods, and dies before Probate, the Debt is discharged, and this amounts to a Release; for by his Administering he hath accepted to be Executor, and becomes a complete Executor, and cannot afterwards refuse to waive it: He may before Probate receive all Debts due to the Testator,

1 Salk. 299,  
304, 305, 306.  
&c.  
3 Salk. 162,  
163.

Plowd. 185,  
1 Cro. 372.  
1 Jon. 345.  
8 Rep. 136.  
1 Leon. 320.  
1 Sid. 79.  
Moor 236.  
1 Inst. 264.  
1 Roll. 917.  
5 Rep. 28.  
9 Rep. 97.  
1 Mod. 213.  
1 Cro. 614.

tor, pay Money, release and maintain any possessory Action, as Trover, or Trespass for Goods of the Testator taken since his Death, and he may avow for Rent due after the Testator's Death, but not before: And the Right of an Executor is not like that of an Administrator, which is derived from the Ordinary, for it is entirely by Virtue of the Will, and the Probate gives him no Right, either to his Office or an Action; he may bring an Action before Probate, tho' an Administrator cannot before Letters of Administration granted; indeed he can't proceed in such Action before Probate of the Will, it being convenient in other Respects, but not to give him a Right. Where an Executor is made, and he never intermeddles, he may refuse whether he will administer or not; and if several Executors are appointed, they may all refuse; but if one administers, the Rest cannot refuse the Executorship; but they must all be named in Actions brought in Right of the Testator, and notwithstanding such Refusal, any of them may release a Debt; and if the refusing Executor survive those who acted, and Administration is granted to another, it is void: But if such refusing Executor come into Court and refuse, in that Case Administration may be committed to another. And when an Executor dies after he hath administered, and before Probate, an immediate Administration shall be granted; and if he makes a Will, and another Executor, such Executor can never be Executor to the first Testator, because he cannot prove the Will, for he is not named in the Will of the first Testator, and no Person can prove his Will but he who is named therein; though if the first Executor had proved the Will, then his Executor would have been Executor to the first Testator, because the Probate of the Will would have been a Continuance of the first Executorship. Upon the whole Matter, the Executor in this Case having administered Part of the Goods, tho' that Executorship was determined by his Death, yet he being once Executor by his Administring, that operated as a Release of the Debt; and afterwards he dying before Probate, the Inability of his Executor to continue the Executorship will not alter the Case, so as to revive this Debt.

The Chief Justice also held, that when the Obligor makes the Obligor his Executor, altho' it is a Discharge of the Action, the Debt is Assets; and the making him Executor does not amount to a Legacy, but to Payment and a Release. If A. be bound to B. in a Bond of 100 l. and then B. makes A. his Executor; here A. has actually



received so much Money, and is answerable for it; and if he does not administer so much, it is a Devastavit.

Rouse *versus* Etherington. Pasch. 1 Ann.

**A**ction of Debt in C. B. against two Executors; a Writ of Capias issued against both, but one only appear'd, and Judgment was had against both of them; upon which he that appeared brought his Writ of Error in this Court. (16.) 1 Salk. 512; 513.

Holt C. J. If Debt be brought against several Executors Defendants, and one appears, and the other makes Default upon the grand Distress, the Court may proceed against the Executor appearing; and if the Plaintiff recover, Judgment shall be against all the Executors for the Goods of the Testator. And on a Capias in Debt by Statute, where a Capias is returned as to one Defendant, and Non est inventus as to the rest, the Plaintiff shall proceed against him that appears, and have Judgment against all; for the Default upon the Capias is the same as on the Grand Distress. And here the Judgment being against both the Executors, one only ought not to bring the Writ of Error, for 'tis to the Damage of them all; and though the Costs are adjudged against him that appeared, they are but accessory to the principal Judgment, which cannot be reversed as to them alone. 9 E. 3. 25 E. 3. c. 17. 1 Keb. 452, 743, 892.

Jenkins & Ux. *versus* Plume. Hill. 2 Ann.

**I**ndebitatus Assumpsit by Husband and Wife Executors, who declared quod cum the Defendant was indebted to them in 20 l. as Executors of the last Will and Testament of J. S. for Money had and received to their Use as Executors, he promised to pay, &c. Non Assumpsit was pleaded, and the Plaintiffs were nonsuited. Now the Question was, upon Stat. 23 H. 8. c. 15. whether they should pay Costs? (17.) 2 Salk. 207.

Per Cur. The Plaintiff shall pay Costs. For the Receipt being since the Death of the Testator, if it was by the Consent of the Executor, it is the Receipt of the Executor; on the other Side, if it was without his Consent, yet now the bringing of this Action is a Consent.

Holt C. J. said, That if the Goods of the Testator be taken and converted before they come to the Hands of the Executors,

Executoz, he shall not pay Costs upon a Nonsuit in an Action brought for these Goods, for they were never Assets.

Berwick *versus* Andrews. Hill. 2 Ann.

(18.)  
6 Mod. 125,  
126.  
S. C. 1 Salk.  
314.  
1 Saund. 219.  
1 Sid. 397.  
1 Lev. 231,  
255.

**E**RROR of a Judgment upon Nil dicit in the Common Pleas. The Case was, Executoz brought an Action upon a Judgment obtained by the Testator, suggesting a Devastavit in the Life-time of the Testator. And it was objected, that this carried it a Step farther than Wheatly and Lane's Case in 1 Saund. for there the Action was brought by the Party to the Judgment, and to whom the Wrong was done; whereas this is, first, by one that is no Party to the Judgment; for if he would sue Execution upon this Judgment, he must have first made himself Party by a Judgment on a Sci. fa. and next, by one to whom the Tort was not done; and this is a personal Tort, that ought to die cum persona. And that this Matter ought not to go a Step farther, vide 1 Vent. 313. 2 Lev. 145, 209. 3 Keb. 735, 797. That such Action will not lie upon a Bond suggesting a Devastavit, and it being for a Wrong done to the Testator, an Action ought not to lie for it for the Executoz, no more than it would lie against an Executoz de son Tort, 'till 30 Car. 2. c. 7.

The Record of the Case of Wheatly and Lane was brought into Court, agreeing exactly with this Declaration, and the Plaintiff had Judgment.

Smith *versus* Harmon. Pasch. 3 Ann.

(19.)  
Mod. Caf.  
142, 144.

**O**N a Scire facias sued out by an Executoz, on a Judgment recovered by the Testator, who died before the Return of the Writ of Enquiry of Damages, to shew Cause why Damages should not be assessed, and Judgment final given against the Defendant, also an Executoz, according to the Statute 8 & 9 W. 3. c. 11. by which, if any Plaintiff happen to die after an Interlocutory Judgment, and before final Judgment obtained, the Action shall not abate by reason thereof, if such Action might be originally prosecuted or maintained by the Executoz or Administrator, &c. who may have a Sci. fac. against the Defendant, or if he be dead, against his Executoz, &c. The Defendant pleads an extraordinary Plea, to which the Plaintiff demurs generally.

Holt C. J. This Statute has now established the Interlocutory Judgment, and it never was the Intent of it that the Executor should say more than the Party himself might have said, for its Meaning was to put the Executor in the same Condition with the Testator. And here the Defendant, who is an Executor, pleads in Bar of the original Action, which lies not in his Mouth to do. There can be no Mischief to the Executor in this Case, because Judgment shall be given, that the Plaintiff do recover de bonis Testat. and in like Manner of Costs; and it shall not be as usually, of Costs of Goods of the Testator si, ac si non of the Executor's Goods; but such Judgment shall be as shall only affect the Assets, for it shall be just as if final Judgment had been against the Testator in his Life-time. Then if he be excluded from pleading here, he does not admit Assets; so he is as much at large, as if the Judgment had been actually completed in the Testator's Life; and sure the Debt, the Right whereof now appears on Record, is of a higher Nature than Debt upon a Bond, though the Quantum of it be not ascertained. If an Executor voluntarily pay a Statute, before a Judgment had against the Testator, it is a Devastavit; but if after the Testator's Death Execution be taken out and executed, he may plead it to a Sci. fac. upon the Judgment, because he could not hinder Execution.

1 Keb. 55,  
310.  
3 Keb. 160.  
Raym. 165,  
55.  
1 Sid. 131.

And. 208,  
209.

And Powel J. agreeing said, that if in Action of Account Judgment is, That the Defendant shall account, a Scire facias lay for the Executor before this Statute, yet the Party could plead nothing against the first Judgment.

Per Holt C. J. The Sci. fac. brought in this Case is not so good as it should be; for it should be ad audiend. Judicium, that is giving the Parties Day to come and hear the Judgment of the Court. At another Day, none appearing for the Defendant,

The Plaintiff had Judgment.



## Fairs and Markets.

Symonds *versus* Durridge. Trin. 6 Ann.

( 1. )

**I**N an Action of Trespafs, the Defendant pleaded, that there was a Market held there, and so justifies: To which the Plaintiff demurs.

Eyre pro Defendente. As to the Want of averring that it is a Market either by Charter or Prescription, the Right of the Market is not in Question; but it doth appear by the Pleading that there was a Market held, which is a sufficient Justification. Den v. Oliver, 2 Cro. 43. A Lord of a Market may maintain an Action for being disturbed in taking of Toll, without shewing his Title to the Market. 3 Lev. 190.

Holt C. J. If a Man take upon him to hold a Market, it is no Matter whether he hath a Right or not; that will licence all that come there.

Powell J. You have held a Market, but now to punish them you would disclaim, which you cannot do; for how can you hold a Market, and let no Body come there?

Per Curiam: Judgment for the Defendant.

Burdett's Case. Trin. 8 Ann.

( 2. )  
1 Salk. 327.

**I**N Trespafs, the Defendant justified as Clerk of the Market within the District of White-Chapel, for a Distress for not using Measures marked according to the Standard of the Exchequer.

Mod. Cases  
104.

Holt C. J. held, that the Clerk of the Market could not have Power to estreat Fines and Amerciaments, otherwise than as a Franchise. And it is more reasonable the Clerk should bring the Standard with him, than that the People should follow him, or attend at a Place out of the Market.

## F E E S.

Pope *and* Hayman. Mich. 5 W. & M.

**I**N an Action against a Sheriff for his Fees, it was objected that this was a Ca. sa. which was not a Satisfaction, and that the Sheriff was not to have a Fee, but upon a Satisfaction, and the Statute does not give any Fee to the Sheriff, but only permits him to take a Fee not exceeding such a Rate; and if the Sheriff in this Case shall have a Fee on a Ca. sa. then if two are bound, and Judgment against both, and they are both taken in Execution, there will be two Fees to the Sheriff, where the Party has not any Satisfaction. (1.) Skin. 363.

Per Curiam, the Usage has always been since the Statute of 28 Eliz. to take a Fee upon a Ca. sa. and such a Fee is allowed to the Sheriff for his Trouble which he had in the Execution; and therefore if there be a second Execution, he ought to have a Fee for that also for his Trouble as well as for his first.

And per Holt C. J. An Action would lie for his Fee, for the Law permitting him to take it, makes it a Duty.

Agreed in this Case, that the printed Books are mistaken, for the Roll is Anno Eliz. 28. and the Statute is Anno 29.

Burdeaux *versus* Dr. Lancaster. Hill. 9 W. 3.

**T**HE Plaintiff had his Child Baptized at the French Church in the Savoy, and the Defendant being Vicar of St. Martin's, together with the Clerk, libelled for Fees due to them; on which the Plaintiff moved for a Prohibition. (2.) 1 Salk. 332, 334.

By Holt C. J. Nothing can be due of common Right; Lyndewode says, it is Simony to take any Thing for Christning or Burying, unless it be a Fee by Custom; but then, a Custom for any Person to have a Fee for Christning a Child, when he does not do it, is not good; for 'tis like the Case in Hobart, where a Person dies in one Parish, and is buried in another, the Parish where he died shall not have a Burying Fee. If the Defendant hath a Right

to Christen, he should libel for that Right, and not as he has done.

Where a Custom is denied, Prohibition shall go; and it is said, that Burials at Common Law ought to be in the Church-yard, and without Fee.

*Tyson versus Paske.* Mich. 4 Ann.

( 3. )  
1 Salk. 333.

**T**HIS was an Action of Debt brought by the Sheriff for his Fees, on executing a Writ of Elegit; and it was objected, that this Case was not within the Statute 29 Eliz. for the Execution is not compleat, and the Plaintiff cannot enter, but must bring Ejectment.

29 Eliz. c. 4.  
2 Sid. 155.  
3 Vent. 351.

Holt C. J. There is the same Reason for demanding of Fees for executing an Elegit, as an Extent; upon Elegit the Sheriff returns, that he has taken an Inquisition, extended the Lands, and delivered them to the Plaintiff, and there is a Liberate in the Body of the Writ, so that the Plaintiff on this Return may enter; for thereby he becomes Tenant by Elegit, and may maintain an Ejectment, and assign his Interest upon the Land. The Execution is compleat and perfect, and the Plaintiff's being put to an Ejectment is no Reason against it; for in Case of an Extent upon a Statute, where the Liberate is distinct, he cannot enter by Force, though he may without it; and so he may here.

## F E L O N S   G O O D S .

*Jones versus Ashurt.* Trin. 5 W. & M.

Skin. 357,  
358.

**I**N Action of Trover for divers Goods seized by the Sheriff, of a Man who was executed for Robbery. Upon Evidence it appeared, that whilst the Felon was in Newgate he made a Bill of Sale of the Goods mentioned in the Declaration, to the Intent to make Provision for the Plaintiff, being his Son.

By Holt C. J. The Bill of Sale was ruled fraudulent, for though a Sale bona fide, and for a valuable Consideration,



tion, would have been good, because the Party had a Property in the Goods 'till Conviction, and ought to be maintained out of them; yet such a Conveyance as this cannot be intended to any other Purpose than to prevent a Forfeiture, and to defraud the King. And no Countenance ought to be given to such a Contrivance, where a Man having gained a considerable Estate by Robbery, when he is detected, he would give it to his Posterity.

The Plaintiff was nonsuited.

## F E L O N Y.

*B. R. Mich. 1 Ann.*

**H**Aagen Swensden was indicted for forcibly taking, carrying away, marrying and carnally knowing State Trials.  
P. R. a Virgin, having an Estate, &c.

Holt C. J. summed up the Evidence, and gave the following Directions to the Jury.

1. You are to know that if she was taken away by Force, and afterwards married, though by her Consent, yet is he guilty of Felony; for it is the taking away by Force that makes the Crime, if there be a Marriage, though by her Consent.

2. In the next Place it is to be observed, that she was taken by Force, and a Stratagem was used to give an Opportunity thereunto, and the Arrest was but a Colour.

3. You may consider upon the Evidence, how far the Prisoner was concerned in the first Force. It is true, he was not at the Arrest, and did not appear 'till she was brought to Hartwell's House; and under the Pretence of bawling her, she was carried to the Nine Tavern, where there was a Parson ready, and the Marriage was had in such a Manner as you have heard. Now it is left to you to determine whether the Marriage was not the End of the Arrest? And if so, how it could be possible for such a Force to be committed to effect the Prisoner's Design, and he not privy to it?

4. If it can be imagined he was not privy to the colourable Arrest, yet she was under a Force when he came to her  
at

at Hartwell's House, and from thence she was carried by Force into the Nine Tavern, where she was married: That is a forcible Taking by him at Hartwell's House. And though when she was at the Nine Tavern she did express her Consent to be married, yet it appears even then she was under a Force, and had no Power to help herself. She was also under a Force when she was carried to Blake's and put to Bed; nay when she was carried to the Justice of Peace, even then she was under a Force, and all that she said was not freely, but out of Fear; such a Fear would avoid any Bond, for she was under Imprisonment. But however, if the first Taking was by Force, and she had consented to the Marriage, the Offence is the same, it is Felony. He was convicted and executed.

## Fines and Amerciaments.

The King *versus* Mayor of Hertford. Mich.  
11 W. 3.

2 Salk. 55.

**I**N an Information in Nature of a Quo Warranto, Issues were returned upon three several Distringas's. Motion for a Rule to estreat them.

Et per Holt C. J. If it be an extraordinary Case, we can make a Rule to that Purpose, but otherwise the Course of the Court is to send them up into the Exchequer at the usual Times, (viz.) the last Days of the two Issuable Terms. But there being nothing extraordinary here, the Motion was denied.

1 Lill. 89.

Term Mich.

11 W. 3.

Cases W. 3.

318.

Per Holt C. J. A Fine ought to be absolute, and not conditional; and therefore a Fine, unless such a Thing be done in futuro, is void. By Common Law a Fine for not repairing of the Highway, was for the Default in not repairing the Highway, and ought to be absolute; but by a late Statute the Fine is to go towards the Repair.

## FINES of LANDS.

Jones *versus* Morley. Trin. 9 W. 3.

**T**HE Husband and Wife by Indenture between them and others, bearing Date in January, covenanted to levy a Fine of Lands, as of the next Hillary Term, and declared the Uses thereof; and a few Days afterwards there was another Indenture of Covenant executed by the Husband and Wife only; after which the Fine was levied accordingly in the same Hillary Term, in which both the Indentures did bear Date. Now the chief Question was concerning the Operation of the Fine on these Deeds.

Holt C. J. Where a Deed is made between several Persons to lead the Uses of a Fine, and afterwards a Fine is levied of the same Lands, but is different from the Deed in the Circumstances of Quantity of Acres, Time of levying, or Parties to the Fine; yet it shall operate to the Uses of that Deed, unless a contrary Intent or Agreement intervening between the Deed and the Fine be proved; and here Proof of a Parol Agreement that the Uses should be otherwise, shall be admitted, because of the Variance. But if the Fine is pursuant to the Deed which leads the Uses thereof, and they agree in Circumstances, in such Case no Parol Agreement of any other intervening Agreement, can be admitted against such Deed; though a second Deed of Uses, intervening and agreeing also in Circumstances with the Fine, shall control the first. But the first Deed cannot be controlled by any other Deed made after the Fine is levied, much less shall any subsequent Agreement by Parol control any precedent Deed. And in the principal Case if this second Writing is not properly a Deed, because not made between all the same Parties, it will then amount to no more than an Agreement put into Writing; and if so, then it is no other than a Parol Agreement, which cannot be admitted against the first Deed.

(1.)  
Carthew  
410, 412.

2 Lev. 149.  
2 Keb. 366.  
1 Vent. 278.  
2 Roll. Abr.  
749, 251.  
Dyer 206.  
1 And. 126,  
240.



Anonymus. Hill. 12 W. 3.

(2.)  
3 Salk. 168. **A**T Common Law, Fines were levied on any Original Writ; as upon a Writ of Entry, or of Right, &c. as well as upon a Writ of Covenant; and might be levied of any Thing for which a Præcipe quod reddat or permittat lies: And they are leviable in the Counties Palatine, &c. by Statutes. Also by the Common Law all Fines were levied in Court; but now since the Statute 15 Ed. 2. Commissioners may be empowered to take them. Per Holt C. J.

Fazacharley *versus* Baldo. Trin. 3 Ann.

(3.)  
1 Salk. 341. **I**N this Case it was held by Holt C. J. That if a Writ of Error be brought in this Court to reverse a Fine levied in C. B. the Record of the Fine itself is never removed hither, but only a Transcript of it. But if we adjudge it erroneous, then a Certiorari goes to the Chirographer to certify the very Fine, and when it comes up it is cancelled here.

See Discent and Uses.

## F I S H E R Y.

Smith *versus* Kemp. Trin. 4 W. & M.

(1.)  
2 Salk. 637.  
4 Mod. 187.  
Carth. 285. **I**N an Action of Trespass Vi & Armis, for taking Fishes ex libera Piscaria sua, upon Not Guilty pleaded, and Verdict for the Plaintiff; it was moved in Arrest of Judgment, that he who had libera Piscaria could not maintain Trespass.

Reg. 95.  
F. N. B. 15.  
43 E. 3. 11. Holt C. J. There is the same Writ in the Register, and likewise in Fitzherbert; and there are three Sorts of Fisheries. 1. Separalis Piscaria, where he that hath the Fishery is Owner of the Soil; and therefore 'tis a good Plea in an Action brought by him, that it is liberum tenementum of another. 2. Libera Piscaria, which is where the Right of fish-

ing is granted to the Grantee, and such Grantee hath a Property in the Fish, and may bring a possessory Action for them, without making any Title. 3. Communis Piscaria, and this was to be resembled to the Case of other Common. And though it was insisted, that the proper Remedy here was a special Action on the Case for the Wrong done;

46 E. 3. 11.

Per Cur', Trespass was brought for fishing in Libera Piscaria, and it does not appear by the Book but the Action was maintainable; but if it be a Fault, it is cured by the Verdict.

The Plaintiff had Judgment.

Gipps *versus* Woollicot. Pasch. 9 W. 3.

**T**respass for fishing in Separali Piscaria, and also in the Plaintiff's Free Fishery. As to the Separal' Piscaria, the Defendant was found Not Guilty; and as to the Free Fishery, the Jury found a Special Verdict.

(2.)  
Skinn. 677,  
678.

Holt C. J. It has been lately adjudged, that a Separate Fishery, and Free Fishery are all one; and if he had the Land covered with Water, why should he not have the Fishery? By the Grant of it, the Soil passes; and there is a Difference between a Fishery and a Free Warren. I am of Opinion, that where the Owner of the Soil hath a Right to fish with others, he may have an Action of Trespass, tho' it doth not lie for one who has but a Liberty to fish; and although he might have *Clausum fregit*, & *in aqua sua piscatus*, yet I think Trespass lies: And if it be not proved otherwise, we will intend it his Separate Fishery of Common Right.

Devis 55.  
Fitzh. 29.  
27.  
3 H. 4. 12.  
4 H. 6. 13.

1 Salk. 357.

The Subject hath a Right to fish in all Navigable Rivers, as he has to fishing in the Sea. Per Holt C. J.

## Forcible Entry.

Dom. Rex *versus* Harnisse. Trin. 11 W. 3.

(1.)  
1 Mod. 443.

**U**PON a Vi Laica removenda, a Parson had forcibly seized the Church, and upon an Inquisition the Force was found, but the Justice of the Peace did not presently restore the Possession, (as he ought to have done) but had a Record of it made up, and deferred the Delivery of the Possession for two or three Years.

And now all this Matter appearing to the Court, it being removed hither by Certiorari, they were of Opinion, that this Proceeding was irregular, and that Restitution ought to be awarded.

8 Co. 119. b.  
120. b.  
2 Brownl.  
266.  
2 Bulst. 139.  
2 Inst. 380.  
Bro. Faux  
Impris. 32.  
Dett 16.  
Execution,  
135, &c.

Holt C. J. I ground my Opinion upon the Authority in *D. Bonham's Case*, 8 Rep. which says, that the Commitment must be immediately. So upon the Statute of H. 6. of forcible Entry, when the Force is found by the Inquisition, Restitution must be immediately. The Reason of one Case is the same with the other.

Per tot. Cur': Let Restitution be awarded.

The Queen *versus* Winter. Pasch. 4 Ann.

(2.)  
2 Salk. 587,  
588.

**A**N Inquisition being taken by Justices of Peace, and a forcible Entry and Detainer found, a Warrant was granted by them to restore the Possession; which was suspended by a Certiorari issued; whereupon the Defendant made a Motion for a Procedendo.

Holt C. J. here said, that if the Party, against whom the Inquisition was found, would traverse the Force, that was always a Reason to stay Restitution; and that it had been held a Superfedeas to the awarding it: And all Inquisitions of Office are of common Right traversable. And if in Case of an Inquisition of forcible Entry taken before a Justice of Peace, the Defendant tenders his Traverse immediately, the Justice must adjourn to another Day, and award Process to return a Jury thereof. In *Sir Richard Bray's Case*, an Inquisition found a forcible Entry, and the

1 Sid. 287.  
2 Keb. 571.  
Dyer 122.



Defendant offered immediately before the Justice to traverse the Force; the Justice refused the Traverse, and granted Restitution; but Kelyng C. J. granted Re-restitution.

See Entry.

## Foreign Attachment.

Masters *versus* Lewis. Trin. 6 W. & M.

**A**T Guildhall; an Attachment is made in the Hands skin. 516. of the Archbishop as Ordinary, and A. B. is summoned to come in as Garnishee, and pending the Attachment, and before Condemnation, an Action is brought in B. R. and upon the Trial, this Attachment was given in Evidence.

And it was ruled by Holt C. J. that pending the Attachment, if an Action is brought, the Attachment is not Evidence; for no Property is altered 'till Condemnation.

## FORESTALLING.

The King *versus* ———. Mich. 3 W. & M.

**I**ndictment for forestalling by buying Fish at Billingsgate. 1 Show. 292.  
Holt C. J. held on Trial at Nisi Prius, that the Party was not guilty; for Billingsgate was a Market Time out of Mind, and so the Party was acquitted: And by him, were it otherwise, all the Fishmongers were liable to Prosecutions.

Note; This was at the Instance of that Company against a poor Woman that cried Fish.

## FORGERY.

The Queen *versus* King. Hill. 1 Ann.

Farr. 150,  
151.

**U**PON an Indictment of Forgery for forging a Bond, removed out of London to this Court, and demurred to here; several Exceptions were taken to the Words of the Indictment.

By Holt C. J. The Words falso fabricavit are as much as to say, that the Defendant being a false and malicious Man did falsely forge; and though it could not be Obligatorium, if it was forged, for it is not in Truth binding, yet in Shew and Appearance it is, and that is enough; because it is an Obligation, though a false one. Besides, these Bonds are not merely void by the Statute, but only voidable; and therefore the Special Batter ought to be pleaded, and not Non est factum. You may say that a forged Bond binds no Body, and infer from thence, that it is no Crime to forge; but that will not do.

Judgment for the Queen.

See Indictment.

## Frauds and Perjuries.

Peter *and* Compton. Trin. 5 W. & M.

Skin. 353.

**T**HE Question upon a Trial before Holt C. J. at Nisi Prius, in an Action upon the Case, upon an Agreement, in which the Defendant promised for one Guinea to give the Plaintiff so many at the Day of his Marriage, was, if such Agreement ought to be in Writing, for the Marriage did not happen within a Year?

Holt C. J. advised with all the Judges, and by the greater Opinion, (for there was a Diversity of Opinions, and his own was eontra) when the Agreement is to be performed upon

upon a Contingent, and it does not appear within the Agreement, that it is to be performed after the Year, a Note in Writing is not necessary; but when it appears by the Tenor of the Agreement that it is to be performed after the Year, there a Note is necessary.

Astley *versus* Child. Trin. 7 W. 3.

**E**jectment. The Plaintiff produceth an Assignment of a Lease from Foster to his Lessor, and it was allowed to be read for Evidence, without producing the original Lease. Com. 342

The Case was, that one Golding 11 Martii 1692, in Consideration of a personal Estate brought by his Wife, as Widow of a former Husband, to Part whereof her Children were intitled, assigns to Barton, in Trust for his Wife, during her Life, and after for the Children: And he 23 Martii mortgageth to the Defendant for good Consideration; and after for more Money releaseth the Equity of Redemption.

Holt C. J. said, It was very strong Evidence of a Fraud, it was but voluntary; for the Children were not bound by such Assignment, nor barred of their Shares of the personal Estate.

Quer. non pros'.

## Fraudulent Sale.

Sanders *versus* ———. Trin. 7 W. 3.

**G**oods were taken in Execution in the Possession of Sanders, who had them by Virtue of a Sale from Gulton, upon which Sanders brought an Action. The Defendant insisted, that the Sale to Sanders was fraudulent against him, he being a Creditor by Judgment. Skin. 486.

Holt C. J. said, that if the Judgment was upon a Point tried, that then he need not prove the Consideration, but it shall be intended good; but if it be a Judgment by Confession, he ought to prove it to be for a just Debt, otherwise



wife he shall not overthrow the Sale, though it be fraudulent; for it is good against all, but Creditors for a just Debt bona fide due.

## G A M I N G.

Walker *versus* Walker. Mich. 6 W. & M.

( 1. )  
5 Mod. 13,  
14.

**A**ction for Money won on a Wager, by a general Indebitatus Assumpsit; after Verdict, Counsel moved in Arrest of Judgment, for that it is not a good Promise in Law, and there is no Debt.

Holt C. J. This is merely a Wager, and no Indebitatus Assumpsit lies for it; for to make that lie, there must be a Work done, or some meritorious Action for which Debt lieth; and here this Wager is due in a collateral Respect. It is true, the Cast of a Die alters the Property, if the Money be staked down, because it is then a Gift on Condition precedent, and an Indebitatus Assumpsit lies against him that holds the Wager, for it is a Promise in Law to deliver it if won. After this Verdict, if it could be any Ways made good, we would do it; but a Verdict cannot make that good which is bad in Law. Let it stay, we will consult the Judges in the Exchequer Chamber.

4 Mod. 409.  
3 Lev. 118.

If on the Loss of the Wager, the Defendant had promised the next Day to pay it, yet an Assumpsit would not lie thereon, because it wants Consideration, it being but executory.

Husley *versus* Jacob. Mich. 8 W. 3.

( 2. )  
1 Salk. 344.  
5 Mod. 175.

**T**HE Lord C. lost Money at Play to the Plaintiff, and gave him a Bill for it on the Defendant, who accepted it, and afterwards refused to pay the Bill; and now an Assumpsit being brought against him, he pleaded the Statute 16 Car. 2. c. 7. against Gaming.

Holt C. J. If A. loses 100 l. to C. and A. and B. become bound to him for the Money, the Bond is void as to both of them: And I know but of one Case where it shall

not be void, which has been adjudged on the Statutes of Gaming and Usury; and that is, if A. wins 100 l. of B. and for a Debt which A. owes C. he appoints B. to give C. a Bond, 'tis good; for C. is an innocent Person, and not privy to the Tort, and it will be the same if A. be bound with him.

Judgment was given in this Case for the Defendant.

Anonymus. Mich. 12 W. 3.

**A**T Play H. may lose 100 l. to one, and 100 l. to another, upon Tick, because it is a several Contract; (3.) otherwise if it were a joint Contract. Per Holt C. J. 1 Salk. 349.

Smith *versus* Aiery. Pasch. 2 Ann.

**I**N an Action for Money won at Gaming, the Declaration set forth a special Agreement to play at such a Game, and mutual Promises of Payment, &c. It was here resolved, that an Indebitavit Assumpsit did not lie, because that Action lies not but where Debt lies; and it has never been heard that Debt was brought for Money won at Play. There being a Credit for the Plaintiff, whereby the Jury found that he had won Money of the Defendant; Counsel moved for Judgment, alleging that mutual Hazard sufficed to raise a Debt, &c. (4.)

Holt C. J. The Action ought to be brought upon the Agreement of the Parties. 'Tis true, when two agree to play for so much Money, that is an actual Promise; but if either of them win, there is no Debt arises thereupon, for nothing but a valuable Consideration can raise a Debt, and it is an Error to think that every Contract which obliges one to pay Money raises a Debt; for if a Man promise to pay another a Debt due to him from a third Person, and it be for good Consideration, he is thereby bound to pay the Money, but yet it is not a Debt upon him, nor will an Indebitavit lie thereon. 1 Vent. 9.  
2 Vent. 179.  
Hob. 18.

The Judgment was arrested.

Eggleton *versus* Lewen.

(5.)  
3 Salk. 175,  
176.

3 Lev. 118.  
2 Vent. 175.

**I**N this Case, where Action was brought for 20l. won at Cards, there was Judgment by Default, and a Writ of Inquiry executed, &c. and upon a Writ of Error in the Exchequer Chamber, the Error assigned was, that a general Indebitatus Assumpsit would not lie for Money won at Play. Here the greater Number of the Judges inclined that it would. But since Holt C. J. and other Judges have held the contrary, that it would not; but Special Action upon the Case.

See the Case of Pope *versus* St. Leger, tit. Pleadings.

## G A O L.

The Queen *versus* Taylor. Trin. 1 Ann.

1 Salk. 343.  
Far. 31.

**M**otion against the Keeper of the Gatehouse Prison, for not returning a Habeas Corpus for bringing up Prisoners, in order to be sent to the County Gaol.

Holt C. J. None can claim a Prisoner as a Franchise, unless they have also a Gaol-Delivery of Felony, which the Dean and Chapter of Westminster hath not; and therefore ought to send a Calendar of them to Newgate, or return the Habeas Corpus to this Court, with a Claim of their Franchise.



## Good Behaviour.

The Queen *versus* Rogers. Trin. 1 Ann.

By Holt C. J.

**A** Contemptuous Carriage to a Magistrate is a Breach of the Good Behaviour, and he to whom such Affront is offered may bind the Party offending to his Good Behaviour; or, if he has no Sureties, commit him 'till he find some. So in this Court if a Witness will be insolent, we may commit him for the immediate Contempt, or bind him to the Good Behaviour; but we cannot indict him for it, and that is the Course according to the Common Law of England. And a Binding to good Behaviour is not by Way of Punishment, for it is to shew that when one has broke the Good Behaviour, he is not to be any more trusted. Farrell. 29.  
1 Sid. 144.

## G R A N T S.

Germain & Ux' *versus* Orchard. Mich. 3 W. & M.

**I**N Trespass, the Case was found by Special Verdict to be this: Lessee for 1000 Years by Deed, reciting the original Lease of the Lands, grants the said Lands together with the Lease to the Grantee, his Executors, Administrators and Assigns, and all Writings relating to the Premises; Habendum to the Grantee, his Executors, &c. after the Death of the Grantor and his Wife, for the Residue of the Term. (1.)  
1 Salk. 346,  
347.

Judgment being given for the Plaintiff in this Court, thereupon a Writ of Error was brought in the Exchequer Chamber, where it was reversed; and the Court there held, that by the Grant of the Lands in the Premises to the Grantee, his Executors, Administrators and Assigns, the whole Term of 1000 Years was transferred; and as by the Premises the

the whole Term passed presently, but by the Habendum not 'till after the Death of the Grantor and his Wife, of consequence the Habend' was repugnant to the Premises, and void.

And Holt C. J. said, If a Termor grants the Land generally, the Grantee is but Tenant at Will; for it does not appear that the Grantor meant to pass his whole Interest, and this is enough to satisfy the Grant: But if a Termor devises the Land, all his Term passes, or else he would have nothing; for the Devisee cannot be Tenant at Will, because the Devisor must die before the Devise can take Effect, and one cannot be Tenant at Will to a dead Man, so that instantly it would be determined by his Death.

*Oliviere versus Vernon.* Pasch. 3 Anni.

(2.)  
Mod. Caf.  
170, 171.

**T**Rober for a certain Number of Lemon Trees, left standing in the Garden of another, which Garden, with the Trees therein, was afterwards granted and sold away.

Holt C. J. These Trees are in Bores, and separate from the Freehold, and therefore could not pass by the Grant of the Garden; and it would be hard to comprehend them by Construction within the Grant, if the Lords had been all the Trees in the Garden, without there were a Schedule of the Trees intended to pass, and their being mentioned to be the Plaintiff's therein.

Judgment for the Plaintiff.

## Grant of the King.

*Basse and Bellamount.* Pasch. 12 W. 3.

Cases W. 3.  
399.

**I**F the King grants a Tract of Land in the Plantations abroad to a Man, with a Legislative Power, which Land the Grantee passes over to another, the Legislative Power shall not pass as a Privilege annexed to the Land, but that remains with the Person of the Grantor.

See Estate.

## GUARDIANS.

*Case of Thorpe & al.* Trin. 8 W. 3.

**I**N this Case of enticing an Infant to leave his Father, Carrhew 384, 386. &c. it was alledged that the true Reason of Guardianship, is not with Respect to the ancient Benefit of the Lord by Tenure, but with Regard to the good Education of the Infant. And there is a Difference between an Action on the Case brought by the Father *Quare filium & haredem suum rapuit*, and an Information in Nature of a Conspiracy, as here, for the latter is to punish the Offence, but the first to recover Damages.

Holt C. J. The Reason why by the Laws of England Cro. Eliz. 769. Sid. 387. 9 Ed. 4. 53. Litt. 114. 1 Inst. 84. the Father hath not the Guardianship of his younger Children is, because by our Law the younger Children cannot inherit any Thing from their Father; and the Guardianship of the Father, which is by Nature, continues till the Son and heir apparent attains to the Age of twenty-one Years; but that is with Respect to the Custody of the Body only.

## HABEAS CORPUS.

*Colonel Lundy's Case.* Pasch. 2 W. & M.

**B**y an Order of the King and Council, 1 W. & M. (1.) the Judges were ordered to meet, and all of them 2 Vent. 314. (except Gregory, Eyre and Turton) were assembled at the Lord Chief Justice's Chamber, to give their Opinion concerning Colonel Lundy, who was appointed Governor of Londonderry in Ireland by the King and Queen, and had endeavoured to betray it; and afterwards he escaped into Scotland, where he was taken, and brought Prisoner into England, and committed to the Tower.

Whether, admitting he were guilty of a Capital Crime by Martial Law committed in Ireland, he might be sent thither from hence to be tried there; in regard of the Act of



Habeas Corpus made Anno 31 Car. 2. which enacts, that no Subject of this Realm shall be sent over Prisoner to any Foreign Parts. But then it has a Proviso, That if any Subject of this Realm has committed any Capital Crime in Scotland, or other Foreign Parts of the King's Dominions, he may be sent from hence to be tried in such Foreign Place.

Upon Consideration of which Proviso, the Judges unanimously gave their Opinion, That there was nothing in the Habeas Corpus Act (supposing he had committed a Capital Crime by Law Martial in Ireland) to hinder his being sent thither to be tried thereupon; and subscribed their Names to the said Opinion, and certified the same to the Privy Council.

Anonymus. Hill. 8. & Mich. 11 W. 3.

(2.)  
1 Salk. 349,  
350.

**I**F the Chief Justice of this Court commit one to the Marshal by his Warrant, he ought not to be brought to the Bar by Rule, but by Writ of Habeas Corpus. And if one in Prison in the Counter be removed into the King's Bench by Habeas Corpus ad respondend', and intending to go over to the Fleet procures some Friend to bring a Habeas Corpus to remove him thither, he shall not be removed till he has answered to the Cause here; and so vice versa of the Common Pleas; each Court shall retain the Defendant in which he is first attached, and after he has answered there, you may carry him where you will. Per Holt C. J.

The King *versus* Fowler. Trin. 12 W. 3.

(3.)  
1 Salk. 350.

**T**HE Defendant was brought up upon a Habeas Corpus directed to the Sheriff or Gaoler; whereupon was returned the Warrant from the Sheriff for taking him, but not the Writ; to which Objections were made.

Holt C. J. and the Court held, that the Habeas Corpus, being directed in the Disjunctive to the Sheriff or Gaoler, was wrong; and where a Man is taken on a Warrant of the Sheriff, in Pursuance of a Writ to him, the Habeas Corpus ought to be directed to the Sheriff, because the Party is in his Custody, and the Writ itself must be returned: Otherwise it is where one is committed to the Gaoler immediately, as in Criminal Cases. It is not here sufficient to return the Warrant, for that may be wrong, when the Writ is

is right; and if it be so, the Party is rightfully in Custody of the Sheriff.

The Writ of Habeas Corpus was quashed.

Keach's Case. Trin. 1 Ann.

UPON the Return of a Habeas Corpus to Venetio H. from the Prison of the Admiralty (where he lay in Execution upon a Sentence) to answer an Action to be brought against him here; it was moved that the Defendant might be committed here, for that there was no other Way to sue him; for he was not chargeable in the Prison of the Admiralty, and there ought not to be a Failure of Justice. (4.)  
1 Salk. 351.

Holt C. J. This is new. Though the Proceeding of the Admiralty is by the Civil Law, yet it is supported by the Custom of the Realm, and this Court must not elude their Process. He enquired as to the Action, and thinking it only a Pretence said, there being no Action pending here, they ought not to commit him; and the Plaintiff could not declare against him till in Custody: Otherwise if an Action had been depending. The Defendant was remanded.

Fazackerly *versus* Baldo. Trin. 3 Ann.

ON a Habeas Corpus to the Sheriffs of L. they returned an Action upon a By-Law, &c. and it was moved by Counsel that the Return might be filed, for otherwise the Party could have no Remedy if it was false; at least that a Procedendo might be awarded. (5.)  
1 Salk. 352.  
Mod. Caf.  
177.

Holt C. J. When a Record is filed here, it can never be sent down or remanded the same Term, or any other, except in Case of Felony, and that is by the Act 6 H. 8. The Record is never removed by a Habeas Corpus, as it is on a Certiorari, but remains below; and the Return is only an Account of these Proceedings, stated and sent up to the superior Court to judge and determine the Matter there: So that if a Cause be removed hither by Habeas Corpus, the Plaintiff must begin *de novo*, and declare against the Defendant as in Custody of the Marshal; and the Writ of Habeas Corpus suspends the Power of the Court below, that if they proceed it will be void, & *coram non judice*. The Return in this Case may be filed, because the very Record of

6 H. 8. c. 6.

1 Sid. 108.

1 Keb. 479.

of the inferior Court is not returned, and therefore will not be thereby filed; and consequently a *Procedendo* may be granted, for it will not send out any Record filed in this Court, but takes off the Suspension they were under by the Habeas Corpus.

The Writ ordered to be filed, and afterwards a *Procedendo*.

## H E I R S.

Brandley *versus* Milbank. Mich. 1 W. & M.

(1.)  
Com. 162.

**E**rror on a Judgment in C. B. The Case was, A. and B. enter into a Bond jointly and severally, in which they bind themselves, their Heirs, &c. A. dies; in Debt against his Heir, he pleads that B. solvit ad diem, and it is found against him, and Judgment entered generally, quod Quer' recuperet debitum.

It was assigned for Error, that there ought to be a special Judgment, and not a general one. 1 Cro. 437. Poph. 153. Jones 88. But admitted that Plowd. 440. Davie *versus* Pepys is, that there shall be a general Judgment; but the Cases before cited, and several others, are contrary to Plowden.

Curia: The Judgment is good, and if it had been as you would have it, it had been ill. Vide 2 Roll. tit. Heir, that there ought to be a general Judgment in such Case, unless the Plaintiff prays a special Judgment.

Kellow *versus* Rowden. Mich. 2 W. & M.

(2.)  
1 Show. 244,  
248.  
3 Mod. 253.

**T**HE Plaintiff brought Debt in the Detinet against the Defendant, as Son and Heir of J. R. the elder, upon a Bond, wherein the Father bound him and his Heirs. The Defendant pleads Riens per Descent; and a Special Verdict found, that the Father being seised of Lands in fee-simple, made a Settlement of it to himself for Life, the Reversion to his eldest Son in Tail, Remainder to himself in fee; the Father dies, and then the eldest Son dies leav-

ing



ing Issue, who also dies without Issue; and now the Defendant being second Son of J. R. the Father, if he hath any Lands by Discent from him in Fee-simple, then they found Assets, and for the Plaintiff; otherwise for the Defendant.

Holt C. J. This Action is well brought; for this Reversion in Fee which is now come into Possession in the Defendant, he has it as Heir to his Father, and it is Assets only in him, not in his Brother and Nephew in Tail, who were not chargeable: The Title which the Defendant has, he hath from the Father as Heir to him; when he is to make his Title, he need only claim as from his Father. Suppose the Defendant had been a Brother of the Half-Blood, he could not have claimed as Heir to his Brother, and yet he would be Heir to his Father; he claims from the Father, and must shew his Cousinage as a collateral Heir, which an immediate Heir need not do; but a Man may bring an Action against a Cousin and Heir, as Cousin and Heir, without shewing how: The Title is as Heir only to him that was last seised; a younger Son may entitle himself as Heir to his Father, and the younger Brother shall not make Mention of his Brother, but claim as Heir to the Father.

Dyer 371.  
37 Aff. 4.

Judgment for the Plaintiff.

Uide Assets.

## H E R I O T S.

Parker *versus* Gage. Mich. 1 W. & M.

A Horse was seised for a Heriot, on which Action of Trover is brought, and Non Cul. pleaded, and the Cause came on to Trial before the Chief Justice.

By Holt, An Heriot Service is founded upon antient Tenure; and either Heriot Service or Heriot Custom is seisable off the Manor, because it lies in prender: A Suit Heriot reserved by Deed cannot be taken off from the Manor. One may seize Heriot Custom or Service any where,

1 Salk. 356.  
2 Leon. 8.  
1 Sid. 437.  
1 Lev. 295.

4 R

and

and need not shew that he seized it within the Manor; but he may not distrain for them out of the Manor where due.

## H I G H W A Y S.

The King *versus* Inhabitants of Hornsey. Trin.  
3 W. & M.

( 1. )  
1 Show. 270,  
271.  
Carthew  
212, 213.

**O**N a Presentment of a Justice of Peace, upon his View, of a certain Way in the Parish out of Repair; the Defendants traverse it generally Non Cul'. The Jury finds a Special Verdict, that it was no common Highway, but that 'twas out of Repair. Here the Counsel for the Parish argued, that this being found to be no Highway, made it to be a void Presentment, because it is a limited Jurisdiction of the Justices of Peace.

2 Lev. 112.  
1 Sid. 140.

Holt C. J. You may Traverse, but that is only by Virtue of a particular Clause in the Statute; but here a Quare will be, if when you plead Not guilty, you do not admit it to be a good Presentment, and that it was an Highway: A Parish, which is to repair of common Right, cannot plead this Plea, and give in Evidence, that another ought to repair, but they must plead it specially; for on Not guilty, you shall not throw it off to another. Indeed if a particular Person be indicted for not Repairing, where he is bound thereto Ratione tenuræ, there upon pleading Not guilty, he may give any Thing in Evidence; so upon an Indictment of a Parish for a Highway, that is found not so: But in Case of a Presentment, it goes in Avoidance of the Justices Jurisdiction, which this Plea doth admit.

Eyre J. It is Part of this Presentment, that they ought to repair, and then surely they may give it in Evidence as a Discharge: The whole Court agreed, that if the Defendants plead specially to such a Presentment, viz. that they ought not to repair the Way, they must likewise shew who ought to repair it, otherwise the Plea will be ill.

The Queen *versus* Inhabitants of Clueworth.  
Pasch. 3 Ann.

**U**PON an Indictment against the Defendants for not Repairing a common Foot-way, they submitted by Pleading Guilty; and the Court, before they would set a Fine, would be certified by some of the Justices of Peace of the Neighbourhood, that the Way was sufficiently repaired. (2.)  
Mod. Cases 163.  
1 Salk. 358.

And by Holt C. J. If one be found Not guilty upon such an Indictment, he is quit of being fined; but a Distingas shall go to the Sheriff against him, 'till he certify the Way is repaired. But where a Man is bound by Prescription to repair a Way, he is not obliged to put it into better Repair than it has been in Time out of Mind, but as it has been usually at the Best.

A Man has Land adjoining to a navigable River; every one that uses that River has, if Occasion be, a Right to a Way by Sink of Water over such Land, or farther in if Necessary.

The Queen *versus* The Inhabitants of the County of Wilts. Mich. 3 Ann.

**M**Otion for a new Trial, where the Issue was, whether the County of Wilts at large, or the Town of L. within the County, were to repair the Bridge of L. in that County; an Order of Sessions formerly made upon the Inhabitants of L. to repair being offered in Evidence for the County at the former Trial, and rejected, upon this Reason, That the Justices of Peace have no Jurisdiction over Highways, but upon a Presentment; and none had been to warrant this Order. It was declared by the Court. (3.)  
6 Mod. 307.  
S. C. 1 Salk. 359.  
6 Mod. 191.

1. That it is a good Cause to grant a new Trial, that the Judge who tried the Cause over-ruled, good, or admitted that which was no Evidence; and that, though the other Party has a Remedy by Bill of Exception, 6 Mod. 18, 22.

2. That the Inhabitants of the whole County cannot, of their own Authority, change the Bridge or Highway from one Place to another, for it cannot be without Act of Parliament.

3. The



1 Salk. 12.  
Vaugh. 341.  
Cro. Car. 266,  
267.

3. The County of common Right are bound to repair publick Bridges, but a particular Person, Town, &c. may for a special Cause, be bound to repair them, as by Tenure, Prescription, &c.

4. If a private Person build a private Bridge, which after becomes of publick Convenience, the whole County is bound to repair it. Vide 2 Inst. 701.

1 Salk. 358.

5. This Matter concerning the whole County, Suggestion may be of any other County's being next adjacent, and the Venue shall come from thence, for the Necessity of an indifferent Trial.

6. One of the County is a good Witness in the Case, though not a good Juroz, and at last a Rule by Consent was made.

And per Holt C. J. If it be not obeyed, an Attachment may go against the Inhabitants of the whole County, and catch as many as one can of them.

See Bridges.

## House of Correction.

*The Case of the Hundred of Blackheath.* Pasch.

I Ann.

1 Salk. 362,  
363.

**T**here being a great Increase of People in the Hundred of Blackheath, it was thought necessary to erect a new House of Correction within that Hundred. For this End, a Petition was presented at the Quarter-Sessions, for such a Work-house, and it was there ordered, that the Justices of the Precinct, or any Two of them, should cause such a House to be built; and should assess a Tax on the Hundred, for the said Work. A Question arose, Whether Justices could cause a House of Correction to be erected in a County which had one already? It was objected, That this Power of the Justices was by 39 Eliz. cap. 4. which Stat. is expired. But per Holt C. J. The 39 Eliz. is continued by 3 Car. 1. and all Acts continued by 3 Car. 1. are likewise continued till it be otherwise ordained. And this stands upon the same Foot with the 43 Eliz. which is no otherwise continued; the Justices there.

1 Salk. 359.  
pl. 7.

therefore may increase the Number of Work-houses for the County, if there be occasion. A second Question was, Whether the Justices could raise the Tax out of the particular Hundred only.

Per Holt C. J. The Tax cannot be raised upon any particular Precinct, but must be upon the whole County; because the House of Correction must be for the whole County, unless in Boroughs and Corporations, and this cannot be done by any Authority at Common Law; because it was no Charge at Common Law. Where the Common Law creates a Charge upon any Precinct, as to repair Bridges, Churches, &c. the Common Law gives them the Method of Answering that Charge: Otherwise where no Charge is by Law laid upon them; as in this Case; therefore a Majority cannot bind the Rest, but all must agree, which Powell and Gould Justices agreed. 3dly, The whole Court agreed, That the Sessions could not delegate their Authority to particular Justices of Peace, but may refer a Matter to them to enquire, and Report back.

## Jamaica Laws.

Blankard *versus* Galdy. Trin. 5 W. & M.

**I**N Debt on a Bond; the Defendant pleaded the Statute of Ed. 6. against buying Offices concerning the Administration of Justice; and averred, that this Bond was given for the Purchase of the Office of Provost Marshal in Jamaica, and that it concerned the Administration of Justice, and Jamaica is Part of the Possessions of the Crown of England: To which the Plaintiff replied, That Jamaica is an Island beyond the Seas, which was conquered from the Spaniards in the Time of Q. Elizabeth, and the Inhabitants are governed by their own Laws, and not by the Laws of England. The Defendant rejoined, that before such Conquest, they were governed by their own Laws, but since that, by the Laws of England. The Plaintiff demurred to the Rejoinder, &c.

2 Salk. 411,  
412.  
4 Mod. 222,  
225, 226.  
Comber. 228.

Holt C. J. & Cur'. In Case of an uninhabited Country newly found out by English Subjects, all Laws in

Force in England, are in Force there: But Jamaica being conquered, and not pleaded to be Parcel of the Kingdom of England, but Part of the Possessions and Revenue of the Crown of England; the Laws of England did not take Place there, 'till declared so by the Conqueror or his Successors. The Isle of Man and Ireland are Part of the Possessions of the Crown of England; yet retain their antient Laws: And it is impossible the Laws of this Nation, by meer Conquest without more, should take Place in a conquered Country; because for a Time, there must want Officers, without which our Laws cannot be executed. Jamaica was not governed by the Laws of England after the Conquest thereof, until new Laws were made; for they had neither Sheriff or Counties, but were only an Assembly of People which are not bound by our Laws, unless particularly mentioned: And if our Law did take Place in a conquered Country, yet they in Jamaica having Power to make new Laws, our general Laws may be altered by theirs in Particulars.

2 And. 116.  
3 Keb. 401.  
7 Rep. 23.  
4 Leon. 33.

Judgment was given for the Plaintiff.

## J E O F A I L S.

Ingleton *versus* Burges. Mich. 1 W. & M.

Com. 166,  
167, 168.  
1 Show. 27.

**T**RESPASS for taking Turf and Stone. The Defendant pleaded, That J. S. was seised in Fee of an antient Messuage, to which Common of Turbarry did belong, and laid a Privilege a Tempore Cujus, &c. to dig Stone, &c. on the Common, and so brings down a Title from J. S. to him; the Plaintiff traverseth the Prescription, the Defendant rejoins, that in an Action of Trespass brought against him by one of the Plaintiffs Issue was joined on the Prescription, and it was found against him, and relies on the Estoppel; to which the Plaintiff demurs.

At another Day Judgment was given for the Defendant, for a Fault in the Declaration, for being in Trespass Quare clausum, &c. tali die & anno Car. 2. with a Continuando to such a Day in the Reign of Jac. 2. it concludes



contra pacem Domini Regis nunc, which was ruled ill upon a General Demurrer; for contra pacem refers to the Trespass, not to the Continuando, and then it is as if no contra pacem had been at all, which is Substance, and bad upon a General Demurrer; and that it is Substance, is proved by Stat. 16 & 17 Car. 2. which by express Words aids it after Verdict; so that it appears by this Statute, that it was not aided by Verdict before that Statute; which it would have been, if it had been but Form. The common Way is to conclude tam contra pacem dicti nuper Regis, quam Domini Regis nunc.

I M P A R L A N C E.

Pasch. 5 W. & M.

Holt C. J. **T**here ought to be no Plea to the Jurisdiction of the Court after Imparlance, but the Practice has been only to make it a Respondeas Ouster. A special Imparlance admits the Jurisdiction of the Court, tho' it has been otherwise used. (1.) Cases W. 3. 40.

Anonymus. Mich. 10 W. 3.

**T**HE Declaration being not delivered four Days before the End of the Term; the Defendant, as he might by the Course of the Court, pleaded to the Jurisdiction of the Court within the first four Days of the subsequent Term; and the Clerk to avoid the Trouble of Making up a Post-Roll entered it, with a special Imparlance, as of the subsequent Term; which spoiled the Plea; and the Clerks were ordered to make up Post-Rolls, and not to use these special Imparlanes, which Holt C. J. said, were crept in of late, and were not known formerly. (2.) 1 Salk. 367.

I N D I C T.

## I N D I C T M E N T.

The King *versus* Trowbridge. Mich. 6 W. & M.

( 1. )  
Skins. 564.

**I**ndiament for erecting a Cottage, &c. pro habitatione, &c. & ulterior præsentant, that he had continued in it four Months, between the 1st of Decemb. and such a Day in April, which was three Weeks more than the four Months; and the Beginning of the Indiament was præsentatum existit, &c. the first Exception was, that ulterior præsentant is insensible, and no nominative Case to it, so void. Secondly, The Continuance is not alledged for a Time certain, but for four Months between such a Day and such a Day, which contains more than four Months, by three Weeks, so that if he be indicted again for this Time, he may not plead this Indiament. Also the Continuance of the Cottage is not alledged to be pro habitatione, and if it be used for a Store-house, or Granary, or other Use, it is not any Offence. And here he has concluded contra formam Statuti, where he ought to have concluded contra formam Stat', to the Offence of Erecting, and then upon the Offence of Continuing, to have made another Conclusion, for they are several Offences, and several Indiaments, and ought to have several Conclusions.

Holt C. J. Ulterior præsentant is a new Indiament, and therefore the Offence of Erecting not well alledged, scil. not said contra formam Statut', and the general Allegation in Conclusion is not sufficient; but as to the Exception, that the Continuing is not alledged to be pro habitatione, non allocatur, for it shall be intended so, when the Erection was pro habitatione; and if it was otherwise, it ought to be shewn on the other Side. There was also another Exception, that the Venire was returnable ubicunque; non allocatur, for the Justices are not obliged to hold their Sessions at a Place certain.

The King *versus* Walcot. Mich. 7 W. 3.

**I**f a Man is indicted and tried in this Court, the Indictment against him is entered upon the Plea-Roll; but if he be tried at the Sessions of the Old Baily, the Indictment when brought here, is put into a Bag and laid by. In Forgery, if an Indictment be for making, or causing to be made a false Bill, &c. in the Disjunctive, it will not be good. Per Holt C. J. (2.)  
1 Salk. 371.

The King *versus* The Inhabitants of Belton.  
Hill. 8 W. 3.

**I**ndictment on Stat. Westm. 2. c. 4. for pulling down hedges; on Motion to quash it, it was refused. (3.)  
1 Salk. 372.

Holt C. J. saying, You may as well move to quash a Declaration without pleading to it.

Afterwards Trin. 11. on a like Motion, Holt C. J. We never quash Indictments for Forgery, Perjury, Subornation, or any Crime concerning the Highways. In Trin. 10 W. 3. B. R. on a like Motion, the Court said, they would not quash an Indictment for enticing away another's Servant upon Motion; so of all Crimes that are heinous. So held Pasf. 4 Ann. Regina v. Wigg, in an Indictment for a Nuisance. 1 Vent. 370.  
2 Lill. 47.

Anonymus. Mich. 2 Ann.

**A**n Indictment was removed by Certiorari, and upon awarding that Writ, a Recognizance taken; and then it was moved to quash the Indictment, after the Recognizance was forfeited. (4.)  
1 Salk. 380.  
2 Salk. 652.  
6 Mod. 246.

Holt C. J. The Practice is or ought to be altered by the late Act; before that, a Defendant came soon enough at any Time to move to quash, but he shall not be allowed to do it now, after his Recognizance forfeited by not carrying the Record down to the next Assizes to be tried: And for the same Reason the Court refused to allow any Exceptions, either to the Certiorari or the Return thereof. Before the Statute 5. & 6 W. & M. and 9 W. 3. A Man indicted in any County might remove it into this Court by 5 & 6 W. & M. c. 11.  
9 W. 3. c. 13.



Certiorari, and never was bound by Recognizance to try it, except in London and Middlesex; and by this Means the Defendant was out of Court and sine die, so that new Process was to be awarded, on which he might be outlawed, unless he came in gratis, which occasioned great Delay, and was the Cause of making those Acts.

A Defendant in an Indictment for a Misdemeanor, by Consent of the Prosecutor and Leave of the Attorney General, may carry down the Cause to Trial; but it shall not be done by Surprise on the Attorney General, and without the Prosecutor's Consent, or any Default in him: And it was ordered to be a Rule hereafter, That when any Indictment is removed hither by the Prosecutor, the Defendant shall not carry it down to Trial without Leave of the Court on Motion.

Mod. Caf. 77.

By Holt C. J. At Nisi prius, this Difference was here taken: If a Civil Action be brought, as Trover for Goods, after Recovery, you may indict the Defendant for Trespass or Felony for the same Taking, because the Offences or Causes of Action are of a different Nature, the one Civil, and the other Criminal; but if the first Prosecution had been Criminal, as an Indictment for Trespass, &c. and the Crime appears to be Felony, there you cannot have Verdict or Judgment on the Indictment for Trespass, it being the inferior Offence.

3 Inst. 213.  
Hob. 138.

The Queen *versus* Daniel. Hill. 2 Ann.

(5.)  
Mod. Cafes  
99, 100, 101.

**T**HE Defendant was indicted, for that he one R. S. Servant and Apprentice to one B. of London, from the Shop and House and the Service of the said B. to depart and absent himself, procured, enticed, persuaded and caused, &c.

2 Roll. 75.  
Poph. 132.  
Noy 105.

Holt C. J. I doubt whether this be an Offence indictable, because it is only a private Wrong to the Master, and not of a publick Nature; indeed enticing, &c. a Man to do a Thing, necessarily imports that the Thing was done: But if a Man commit any Offence under Treason or Felony, and another advise him to withdraw from Justice, or do receive or harbour him in his House, &c. it is no Offence punishable, no more than it is to protect a Man in his House from Arrests in a Civil Action; and since you do not say for how long Time the Absence was, if there were no

more in it, how can the Court apportion the Punishment to the Offence.

Per Cur'. The Indictment is ill as to the Manner, for Want of an express Allegation, that the Servant did absent; which ought to be expressly laid: Trespas will lie for seducing a Servant; and there may be a Difference between a Servant and an Apprentice.

Judgment was arrested.

The Queen *versus* Carter. Pasch. 3 Ann.

**H**E was indicted for a wilful and corrupt Perjury; and the Indictment reciting the Record of the Trial, at which it was supposed the Perjury was committed, several Exceptions were made of Variance, &c. and one Fault objected was, that the Record alledged, was not entered up, but the Minutes of it only taken. (6.)  
Mod. Cases 167, 168.

Holt C. J. In this Case denied the Minutes of it for Evidence, and instanced where a rank Perjury had gone unpunished for ever on such an Omission; for that was final, so as the Party could never be tried thereon again: But here he said, by Reason of other Exceptions, the Indictment being insufficient, they might indict the Party anew; for an Acquittal upon a bad Indictment would not be a Plea to a good one; whereas if the Indictment had been good, an Acquittal had been peremptory. And this Indictment was brought to Trial by the Defendant, so that if he has made it up variant from what it is upon the Plea-Roll, an Acquittal thereupon will be void. 1 Sid. 153, 154.

And per Holt C. J. Where there are two Indictments, the Queen may bring on which she pleases first, when she brings on her Causes her self; but if the Defendant brings them on, he is to do the first Act, and therefore has his Election: But if you will enter a Non Pros, upon that which he desires to bring on first, you thereby enforce him to bring on the other.

The Queen *versus* Dr. Drake. Pasch. 5 Ann. (7.)

**I**ndictment for composing and publishing a Libel, called and intituled Mercurius Politicus, cujus tenor sequitur in hæc verba, viz. In such a Place, he says, by the Revolution we lost our Constitution, and the Title of the House of Hanover. The Doctor being convicted for Publishing a Libel, Judgment was arrested for his having not instead of ver now.

ver is only precarious, being founded on Revolution Principles; then he goes on, where he tells you, what Qualities a good Speaker of the House of Commons should have, and then he tells you such Vices as he should not have; and in the Enumerating of them, (Vices) there is a Variance between the Libel it self and this Tenor set forth in the Indictment, and the Variance is, That in the Libel the Word is (nor), and in the Indictment, the Word (not), the Sense is both Ways the same; but the Defendant would have this to be intended another Libel, so another Crime, and not the same for which this Indictment was found specially; and further 'twas said for the Defendant, that a Tenor and Transcript is the same, being both a Copy; and if an Action was brought here for a malicious Prosecution, the Indictment would not support it, because you would intend it another Thing; then 'tis uncertain what Revolution Principles are.

Holt C. J. said, Every Man in England understands what Revolution Principles are.

Solicitor General said, this Variance would not hurt, the Substance being the same, and likened it to the Case of Sir John Sidenham, 2 Cro. 407. Hob. 180. and to the Case of Sir John Brugis, Dyer 75. 21. So if he were acquitted he might plead autrefois acquit in another Indictment, the Substance being the same, 3 Cro. 503. and if this be held to be a Variance, 'tis hardly possible to prosecute any Person for a Libel, if one Letter's Difference will vary it, tho' in an immaterial Matter.

Holt C. J. Suppose a whole Sentence had varied, if there had been another distinct Sentence right, which was substantial, would not that be good, and whether the Sense be not the same, tho' they are different Parts of Speech, one being a Conjunction the other an Adverb.

Powell J. What shall be a Variance in the Tenor and what not, will be a Matter of Consequence, for a Tenor is a Copy; you needed not set forth the Tenor, but having undertaken it, the Question is, Whether you have done it well? it differs from Actions brought for Words, for there, if the Substance be found, 'tis well enough; but the Question seems to be here, Whether this be a true Copy. Adjournat'.



The Queen *versus* Dr. Drake. Trin. 5 Ann.

SIR James Montague for the Queen cited several Cases, ( 8. ) wherein immaterial Variances did not hurt, especially as this was, and that the Substance was found.

Sir John Hollis for the Defendant took the Difference between Civil and Criminal Proceedings, these being for a corporal Punishment, which was always strictly taken; otherwise when 'twas in Civil Proceedings, because you recover a Property or Satisfaction, but he said this was not the same Libel that you complain of; 'tis true, if you recite only Part of the Libel, that may be well enough, and be the same Libel you complain of; but if you put more into your Information than is in the Libel, then that cannot be the same Libel; 'tis true, the Attorney General did cite a Criminal Case, but that is nothing to our Purpose, for the Case he cited was ruled upon Evidence, and this is on Special Verdict moved to stay Judgment; for if this Question had been started upon Evidence, your Lordship might have ruled the Jury, but now 'tis come here and saved, I do think you will not be of Opinion 'tis good; I am sure my Lord Hale, Pasch. 26 Car. 2. The King ——— did Rule the like Case to be specially found; 'tis true, when it came afterwards to be argued in this Court, the Defendant run away and was outlawed, and so the Point remains undiscussed; but I am sure I never met a Case in our Law-Books to warrant this, and 'twill be a ruling Case in Criminal Matters. I do not think that the Words here are Criminal; first he says, Revolution Principles will put an End to our Constitution; the first of these Words, viz. Revolution Principles are new, and have as yet obtained no fixed and general Construction; and as to putting an End to our Constitution, that is every Day done by all new Acts of Parliament that change any Part of our old Law, for Law and Constitution may very well be the same; then they come with an Innuendo, which I think never was in a Criminal Cause before; the Words are here *sub ficto nomine*, which is the same Thing as an Innuendo.

Holt C. J. Thought that to be pretty Strange, but the Case stands for the Resolution of the Court the next Term.

The Queen *versus* Dr. Drake. Mich. 5 Ann.

(9.) **T**his Case was solemnly argued by the Justices, who agreed that the Variance was fatal, but they all held, that the Matter contained in the Libel was a very pernicious Doctrine, for which he did deserve severe Punishment. In as much as by the Revolution we enjoy our Religion, Liberty, and Estates, &c.

Gould J. said, There was a great Difference between Actions on the Case for Words, and this Case, for Juxta tenorem sequentem is as if he had said in hæc verba, for Tenor was adjudged the same Thing as a Transcript or Copy in the Case of the King and Bear, in the Time of the late King William, in this Court; but I liken this to the Case where a Ban sets forth a Bond which has the least Variance with the Original; there non esse factum may be pleaded to it, and so here this is not the same Libel.

Powys J. In this Case 'twas a great Doubt to the Jury, Whether this was not or nor, but found it not, so that 'tis not the same Libel. 'Twas objected, this was but the Variance of a Letter; but if in such Cases you will amend a Letter, why not a Word? Why not a Sentence? Where will that Non ultra be? But I do not make this to be so small a Variance of a Letter, as if in false Spelling or Abbreviations, which possibly might not hurt; as if one write gain instead of gaine, &c. where the Word and Sense would be the same; but these are different Words and of different Significations, different Parts of Speech, the one an Adverb, the other a Conjunction; the one Positive the other relative; why then 'twill be objected, that in Informations for scandalous Words we are not so nice in Variance; and the Reason thereof is plain, for Words are Things in Air and can't remain, and they end only in Slander. Now if there is Slander in such a Case, 'tis sufficient; but in Libels *litera scripta manet*, so there's a great Difference, and therefore there can't be a Cenor of Words, because there can't be a Copy without an Original; there's a Difference in Case for Words, if there be several Words spoken at the same Time, and some of them are actionable, some are not, yet intire Damages may be given if they tend to the same Slander, and the Words which are not actionable will be held an Aggravation of the others which are actionable; and also if there be Words spoke at divers Times, and the first  
Words

Words are actionable, the others are not so; yet if they tend to the Slander, intire Damages may be given.

Powell J. I agree with my Brethren, and tho' the Objection here seems trivial, yet the Consequences are very Weighty; for if this would not be a Variance, then we should give Judges too large a Power in Cases of Treason, for which this would be a Precedent; and in Cases of Treason, whereon the Lives of the People of England would be drawn in Question, this Precedent might be dangerous; I am not for giving greater Power to Judges than they have, for I do not know where 'twould End; we have the Difference between material and immaterial Variances in our Books very frequently, but that is only when you come on the Substance; but in hæc verba, or in the Tenor, there can be no such Difference, for any Variance is fatal, for nothing can be a true Copy that varies from the Original; so nor instead of not, or not instead of nor is a Variance, and Tenor, as has been told you, is a Copy, and besides the Case of the King and Bear, see the 7 H. 6. 18, 19. what a Tenor is, therefore there can't be a Tenor of Words, because the Original is not in Being. I do not like over-much the Case of Sir John Sidenham, for in the Report of it, 2 Cro. 408. there were three Judges, Hob. Winch and Denham, against the Judgment in the Erchequer-Chamber; for I do not think the Words, I believe in my Conscience, to be so strong as the Words in the Declaration, viz. If Sir John Sidenham had his Will, for the one is absolute, the other but the Man's Opinion, which I take to be different. I do not think that there's any Case that will admit of a Variance of the Words themselves, 3 Cro. 503. but at least there must in such Case be no material Variance. Hardr. 470. but in our Case, as I said, material and immaterial Variances are the same; and 'twould be of dangerous Consequence to have such Power over Peoples Lives, when there is no Authority in Law to warrant it, therefore I am of Opinion that Judgment should be arrested.

Holt C. J. 'Tis a Variance, and of great Consequence, as my Brother Powell said; if there be an Information for a Libel in these English Words, or Ad tenorem sequentem, 'tis the same Thing, but the Information might be, that, inter alia, he writ such a Thing, and so only set forth what you think material, this would be good; but if the Libel had been put into Latin, there nor for not, or such other Variance, which did not change the Sense, would not vitiate it;



it; but when you set it forth in the same Words, then you must not vary from it. If you bring Trespasses for Breaking of your Close, and you set forth the Abuttals of your Close, there you must prove your Abuttals which you describe, or else you fail; so if you declare of an Act of Parliament, which is a general Act, and vary in your Description, this is bad. Dyer 203. a. b. And these Cases differ from Actions on the Case for Words, because Words are transient, and nothing remains of them; but not so of these other Matters; if you bring Trespasses for Assault, Battery and Wounding, and he is guilty of the Assault and Battery, but not of the Wounding, yet the Plaintiff shall recover, for these Things are transient; but if you bring an Information or Indictment for Perjury, and assign the same in his Answer in Chancery, Depositions to Interrogatories or Affidavit, there must be no Variance; and if there be, 'tis fatal; so it is if it were in the Case of Treason; therefore the common Experience is so, and I do agree with my Brother, not to introduce so dangerous a Practice when there's no Authority to warrant it; yet I differ with him as to his Opinion of Sir John Sidenham's Case; but there is no Doubt but Tenoꝝ and Transcript, and a true Copy are the same Thing; so is the Case of the King and Bear, which we have adjudged in the late Reign in this Court. Vide Co. Entr. 508. Reg. 169, 170. 1 Saund. 121. 5 Co. 53. Where an Exemplification is not to be given in Evidence, because 'tis but a Copy, and so is a Tenoꝝ.

*Regina versus Hoskins & al.* Trin. 6 Ann.

(10.)

**A**N Indictment against Two for Scolding, it was moved, that it was not good jointly; because the Scolding of one cannot be the Scolding of the other.

Holt C. J. They may scold jointly, and therefore it is well, but it ought to be a common Scold, which is a Nuisance, that must be indicted; and not for once or twice only.

Powell J. The Indictment may be taken as a several Indictment.

Holt C. J. However we will not quash it, but let them demur to it.

Regina *versus* Harris. Trin. 6 Ann.

**A**N Indictment for entering into a Wood and cutting (11.)  
down twenty Ashes, and thirty Oaks, and they de-  
murred, because it is said the Goods and Chattels of the  
Husband and Wife, which is repugnant, because Trees  
growing belong to the Inheritance.

Holt C. J. We may understand the Husband and Wife  
to be Jointenants, and reject the bona & catalia.

Judgment was for the Queen.

The Corporation of *Bewdly's* Case. Trin. 6 Ann.

**T**here were two Informations, the first Information (12.)  
sets forth, that the 27th of September in the fourth  
Year of her present Majesty, the Defendants Riotose cla-  
moribus & vociferationibus impederunt Ballivos & Burgen-  
ses de Beudley in electione Ballivi, &c. upon Not guilty  
pleaded, there was a Verdict for the Queen.

The second Information sets forth, that the 27th of Sep-  
tember in the 4th Year of her Majesty, the Defendants  
did assemble to disturb the Queen's Peace, and did Vi &  
Armis break the Dooz Cujusdam domus, vocat' the Guildhall  
Burgi prædicti; upon Not guilty pleaded, there was a Ver-  
dict for the Queen.

These Informations having been argued several prece-  
dent Terms, Holt C. J. gave the Opinion of the Court.

As to the first Information, if they have a Right to elect  
a Bailiff or Burgefs, and others come and disturb them in  
so doing, it is an unlawful Act; and indeed a Trespass, be-  
cause they disturb their Franchise. 29 E. 3. 18. Regist. 103,  
104. But here it doth not appear that they had a Right to  
elect, either by Charter or Prescription; and it may be they  
went to elect a Bailiff when they had no Right to elect. It  
is the Right of the Thing that makes the Disturbance an  
unlawful Act, for which Reason we arrest Judgment as to  
this Information.

As to the second Information, it is not sufficient to say,  
that they broke the Dooz Cujusdam domus. It doth not ap-  
pear whose House this was, which it ought to do. Here it  
is not said any Body's House.

It may be objected that this is the Guildhall of the Borough.

To this I answer, that it doth not appear that this is the Guildhall of the Borough; for it may be called the Guildhall, but Calling it so, doth not name or describe what it is, for it may be a Sign thereof, and the Guildhall is in English, which is as tho' not expressed at all by 36 E. 3. for Latin is the Language of the Common Law.

Besides, the Guildhall of a Corporation may belong, not to the Corporation, but to the Lord of a Manor. Lamb. Poult. Dair.

Judgment was arrested also upon this Information.

### The Queen *versus* Wrightson. Pasch. 7 Ann.

(13.)  
2 Salk. 698.

**I**ndictment for saying of Sir Rowland Gwyn, who was a Justice of Peace, in Discourse concerning a Warrant made by him, Sir Rowland Gwyn is a Fool, an Ass, and a Coxcomb, for making such a Warrant, and he knows no more than a Stick-hill; held naught on Demurrer. The Court held, that there was a Breach of Good Manners, and he might be bound to the good Behaviour, but here was no indictable Offence.

2 Salk. 695.

Et per Holt C. J. To say a Justice is a Fool, or an Ass, or a Coxcomb, or a Blockhead, or a Puffhead, is not indictable, quod fuit concess' per Powell. Vide 2 Ro. Rep. 78. 4 Inst. 181.

### Regina *versus* Glanvill. Trin. 8 Ann.

(14.)

**A**n Indictment for a Cheat, setting forth that Glanvill came such a Day to Mosvill, in the Name of Jones, to borrow 5 l. upon which Mosvill lent her 5 l. ubi revera she had never any Authority from Jones to borrow the Money.

M. Dec moved in arrest of Judgment, because here is no false Token; and Mosvill might have had an Action for Money had and received to his Use.

Regina *versus* Jones, Hill. 2 Annæ, an Indictment against Jones as a Cheat, for coming to B. to receive a Sum of Money due to C. ubi revera he had no Orders to receive it; and Judgment arrested.

M. Darnell ad idem. There were several Part-owners of a Ship, which was intended to go a Voyage, and A. came



came to one of the Part-owners, and told her that the Ship wanted Victuals, and that the other Part-owners had given 30*l.* each to victual her, by which she gave him 30*l.* and A. being indicted of this, and found guilty, Judgment was arrested upon the first Motion.

Holt C. J. It is no Cheat to get Money by a Lie.

A young Man seemingly of Age, came to a Tradesman to buy some Commodities, who asked him, if he was of Age, and he told him he was, upon which he let him have the Goods; and upon an Action, he pleaded *infra ætatem*, and was found to be under Age half a Year; and after the Tradesman brought an Action upon the Case against him for a Cheat; after a Verdict for the Plaintiff, Judgment was arrested.

Powell J. If a Woman pretending herself to be with Child, doth with others conspire to get Money, and for that Purpose goes to several young Men, and says to each that she is with Child by him, and that if he will not give her so much Money, that then she will lay the Bastard to him, and by this Means get Money of them, this is indictable.

Holt C. J. I agree it is so, when she goes to several; but not to one particular Person.

The whole Court thought this not indictable; sed adjournatur.

Mich. 8 Ann. Smith *versus* Bowen. Intrat. Pasch.  
8 Ann. Rot. 312.

**A**N Appeal of Murder by George Smith, as Brother and Heir to the Deceased, he being an Infant was admitted to sue by Guardian. The Bill sets forth, that William Smith was, such a Day, at East-Smithfield, in the Fear of God, and in the Peace of our Sovereign Lady the Queen, and he so being, circa horam decimam post meridiem John Bowen as a Felon vi & armis venit, and upon the said William Smith then and there feloniously, voluntarily, and of his Malice aforethought, did make an Assault, and with a Pen-knife upon the left Arm near the left Pap, &c. did strike, and give him one mortal Wound, of which the said William Smith did languish till the Day of —, and then died; and so the said John Bowen as a Felon, and of his Malice aforethought, murdered the said William Smith in East-Smithfield prædict; and if this he deny, he is ready to prove (15.)

probe it. The Defendant pleaded Not Guilty as to the Felony, and demurred to the whole.

Pengelly. If the fact were done in the Night, it ought to be alledged to be done in Nocte of such a Day, and therefore it ought to be Post meridiem in nocte ejusdem diei.

Holt C. J. In an Indictment for Burglary it must be said to be done in the Night, because it is the Night that makes it Burglary; but not so here.

Pengelly. As to the Assault, they lay an Assault to be made, but do not lay it to be done vi & armis; here is vi & armis laid in his Coming, but not in the Assault: A Man may come with Force and Arms, and not make an Assault. Wilson and Law, 4 Mod. 290.

Holt C. J. Venit vi & armis ac insultum fecit, the ac doth couple all, and they are not laid as distinct Acts.

Pengelly. There is no certain Place where the Stroke was given; for it is said that the Deceased was in the Peace of God in East-Smithfield, and there are two or three Places named; then it is said in loco prædict' he did give the Blow, the Year, Day and Hour aforesaid. Now if there were but one particular Place, then loco prædict' would refer to that; but when there are several, then loco prædict' is uncertain; here a particular Place must be set forth. Staunf. 88. b. Bullt. 154. The Statute of Gloucester requireth that there should be a Vill.

Holt C. J. Prædict' is well enough; for the Place mentioned where the Pledges live is not Part of the Appeal.

Pengelly. It doth not appear that the Person died, for it is not sufficient to say obiit, without repeating the Nominative Case.

Powell J. The Nominative Case goes to the Whole of Necessity, De quo quidem Willielmus Smith lanquebat & ibidem, &c. continued to—et obiit of the said Wound.

Pengelly. There is the Letter G. wanting in Georgius, and the Letter r in Murd—r—um. Upon reading the Record, it appeared to be so, and then the original Bill was ordered to be brought into Court.

Holt C. J. I do not think that an Amendment is necessary; but if it be, yet it is amendable at Common Law.

Pengelly. In Stamf. the Original was not amendable.

Powell J. 8 Co. Blackmore's Case, there is an Amendment by the Common Law, though it could not be by the Statute. Then you say it was never done in an Appeal, but I will shew you where, 7 H. 4. 27. Brook, Amendment 101. it was ruled to be amended, because there was something

thing to amend by, which is an Amendment at Common Law.

Some other Exceptions were over-ruled, and the Appellant had Judgment upon the Demurrer; and the Appellee was tried, and found Guilty of Manslaughter only, and was immediately discharged without Bail, being pardoned by the late Act of Grace.

I N F A N C Y.

Thompson *versus* Leach. Trin. 2 W. & M.

**I**N an Action of Trespas and Ejectment a Special Verdict was found, that a certain Person made his Will of the Lands in Question, whereby he devised the same to one and his Heirs, who died without Issue; and his Brother and Heir surrendered the Lands, but he was not Compos mentis at the Time of the Sealing and Delivery of the Surrender, &c. (1.) 3 Mod. 301; 310, 311.

By Holt C. J. and the Court; The Grants of Infants and of Persons non compos are parallel in Law and Reason; and there are express Authorities that a Surrender made by an Infant is void, therefore this Surrender is likewise so. If an Infant grants a Rent-charge out of his Estate, it is not voidable, but ipso facto void; for if the Grantee should distrain for the Rent, the Infant may have an Action of Trespas against him. And in all Cases where 'tis held that the Deeds of Infants are not void, but voidable, the Meaning is that Non est factum cannot be pleaded thereto; for they have the Form though not the Operations of Deeds, wherefore are not void without shewing some special Matter to make them of no Efficacy. If an Infant makes a Letter of Attorney, though it is void in itself, yet it shall not be avoided by pleading Non est factum; but by shewing his Infancy.

Judgment for the Plaintiff.



Coan *versus* Bowles & al. Pasch. & Trin.  
2 W. & M.

(2.)  
Carthew  
122, 123.  
1 Show. 165,  
170.

**E**rror on a Judgment in Replevin in C. B. against three Defendants, and the Error assigned was, for that one of the Defendants was an Infant, and yet had appeared and pleaded by Attorney. To which it was answered, that this was not erroneous, because Judgment was given for the Infant, which is for his Benefit; and also in this Case the Defendants made Conusance in *auter droit*, and all three of them make but one Bailiff; 'tis like the Case where an Infant and one of full Age are made Executors, he with the other Executor may sue *per Attornatum*, because it is in Right of another.

2 Sand. 212.  
1 Sid. 449.  
2 Cro. 420,  
441.  
1 Cro. 424.  
3 Bulst. 180.  
Style 318.

Holt C. J. If an Infant is Executor alone, he cannot sue by Attorney, if he do, he shall be amerced *pro falso clamore*; but where he is joined with others of full Age, 'tis otherwise; for in that Case those of full Age have Authority to dispose of all the Assets without the Assent of the Infant: And that is the Reason of the Difference between an Infant Plaintiff and Defendant. This Appearance of the Infant is irregular; he ought to plead *per Guardianum*, and the joining the other Defendants with him signified nothing, so as to charge the Infant; because if the Judgment pass against him, it shall be for the Damages *de bonis propriis*, and he shall be amerced: Therefore where he is joined, or where he is single, it is in Reason the same, for in both Cases the Loss is equal if Judgment be against him. The Case of several Executors, where one is an Infant, is founded upon Necessity; for it is absolutely necessary, that all who are appointed Executors by the Will should be made Parties to the Action; and where there are several Executors, the Act of one shall conclude his Companion; and therefore the general Appearance *per Attornatum* is good for all of them, and the Reason is not because they are in *auter droit*: If an Infant Executor recover by Attorney, his Appearance is no Error; but it is where he is condemned in the Action. And he laid down this as a general Rule, that a Plea shall never assign that for Error which he might plead in Abatement; and here Infancy might have been alleged in Abatement of the Cognizance: For it shall be accounted his Folly to neglect the Time of taking that Exception. If a Feme Covert bring an Action in her own Name

per Attornatum, and the Defendant pleads in Bar to the Action, he shall not afterwards assign the Coverture for Error: And Infancy is a personal Privilege, of which none can take Benefit but he himself. Action of Waste was brought against a Guardian, and pending the Suit he shews that the Plaintiff was an Infant; and resolved that they could not take Notice of it, because the Defendant had not taken Advantage of it, but had admitted him by Plea at first. So here, since the Plaintiff in this Case is estopped by his own Admission, to assign the Infancy for Error; therefore the Judgment ought to be affirmed.

48 E. 3. 10.  
17 E. 3. 70.  
Cro. Eliz.  
853.  
1 Roll. 782.

All the Judges agreed that the Judgment should be affirmed, but upon different Reasons; three of them being for the Affirmance because the Defendants are in auter droit, and they all make but as one Bailiff in the Conscience.

Per Cur': The Judgment was affirmed.

Williams *versus* Harrison *and* Harrison. Mich.  
2 W. & M.

**I**N an Action on the Case brought by the Plaintiff against the Defendants, being Merchants, according to the Custom of Merchants, upon a Bill of Exchange drawn by them, and protested. R. Harrison, one of the Defendants, pleaded Infancy in Bar, &c.

(3.)  
Carthew  
160, 161.

And upon a Demurrer to this Plea, supposing that Infancy was no Bar to this Action founded on the Custom of Merchants;

The Court, without Argument, over-ruled the Demurrer, for they clearly held, that Infancy was a good Bar notwithstanding the Custom; for here the Infant is a Trader, and the Bill of Exchange was drawn in Course of Trade, and not for any Necessaries; so Judgment was entered, that the Plaintiff nil capiat per Billam *versus* R. Harrison.

And Holt C. J. cited a Case, that where an Infant keeps a Common Inn, yet an Action on the Case upon the Custom of Inns will not lie against him, which is stronger than the principal Case.

1 Roll. Abr.  
fo. 2.

King *versus* Cole, at Guildhall. Mich. 10 W. 3.

(4.)  
Cases W. 3.  
243.

**T**HE Defendant was indicted, for that he being a Bankrupt, and brought before the Lords Commissioners, he refused to give them an Account of his Effects; and his Defence at the Trial, upon Not Guilty pleaded, was, that he was an Infant at the Time of the Debts contracted, and therefore could not be a Bankrupt.

And of that Opinion was Holt C. J. for though his Debts are only voidable at his Election, yet he cannot be a Bankrupt for Debts he is not obliged to pay.

Greek and Mew. Trin. 8 Ann.

(5.)

**T**RESPASS against several, they all appear by Attorney, and plead several Pleas; three Not Guilty, two of which are found Guilty. The others justify by Force of a Statute made 12 Car. 2. that three of them being Officers, pursuant to the Direction of the Governor, &c. and according to the Statute, took the Goods, and that the other Defendants, as their Servants and by their Command, assisted them in it. Upon a Writ of Error brought, the Error assigned is, that A. who was a Servant, was an Infant, and under Age.

Raymond. The Infant's appearing by Attorney is erroneous for all; for it is a joint Judgment and joint Damages are given. Oate *versus* Aylett.

Cummins Serjeant contra. I agree that in all Cases where an Infant ought not to appear by Attorney, if he doth, it is Error.

But whether it is Error here, he only acting as a Servant, I must submit.

The Reason why an Infant cannot appear by Attorney is, because he is thought not to be able to make known his Case, now he being a Servant must plead as the others, and stand or fall by that.

Holt C. J. The Case is the same whether he is Master or Servant, for the Servant is equally liable to Damages with the Master.

Powell J. It is a joint Judgment, and entire Damages, which cannot be divided.

Per Curiam: The Judgment was reversed.



# INFORMATIONS.

The King *versus* Abraham & al'. Mich.  
I W. & M.

**I**nformation by the Attorney General against several Persons for a Riot in pulling down Fences, &c. on a Demurrer to the Information, Sir Fr. Winnington shewed Cause the last Term, viz. that the Defendants ought not to answer to the Information, but it ought in this Case to be by Presentment of a Jury. (1.) Com. 141, 142.

Holt C. J. We cannot impeach the Justice of several of our Predecessors. Informations were frequent in the Time of the Lord Hale; but agreed that Informations for Batteries, &c. are oppressive; that the Star-Chamber was an ancient Court at Common Law, and they proceeded by Information, and therefore so may we; that the Statute of 32 H. 8. of Maintenance, suppoeth Informations to be as lawful as Actions by Bill or Plaint, and it was not a new Way of suing, &c.

Dolben J. That Informations were before 1 Car. there is an Information mentioned in the Institutes to be against Plowden and others in the Time of Queen Elizabeth.

Holt C. J. said obiter, that no Information could be quashed; fecus of an Indictment.

Now this Term, by Eyres and Dolben, Informations are more ancient than 5 Car. and per Dolben, the Statute of 5 Eliz. mentions that Informations were more ancient.

Holt C. J. Informations were at Common Law; for there is no Statute that gives them. This Court cannot take Indictments out of the County in which it sits, but this Court hath all the lawful Power that the Star-Chamber had, and therefore may punish Offences committed in other Counties; which for the greater Part would be unpunished, if Informations for them would not lie in this Court. Comb. 36, 63.

Dolben J. There are several Informations in the Books of Entries of Perjury, Extortion, &c.

Curia: Clearly the Information lies, and Judgment for the King, nisi, &c.

*Pryn's Case.* Anno 2 W. & M.

( 2. )  
5 Mod. 459,  
464.

**A**N Information was exhibited in the Crown-Office against divers Persons for committing a Riot, and pulling down certain Fences, &c. The Question was, whether an Information would lie for a Riot? And for the Defendants it was insisted, that Informations were new Things, and do not lie in this Case; and that it ought to be proceeded in by Indictment or Presentment, in the County where the Fact was committed.

Hob. 115,  
109.  
Dyer 93, 98.  
1 Saund 301,  
302.

Holt C. J. The Abuse of Informations was complained of by my Lord Hale, but not that they were unlawful; and we shall not come now and impeach the Judgment of all our Predecessors. A Man may make a better Argument against Writs of Enquiry and new Trials, than against Informations. As to the Statute of H. 7. I do not think that the Court of Star-Chamber was set up then, but was at the Common Law; and so Informations in that Court, and others, were at Common Law. And notwithstanding the Repeal of 11 H. 4. afterwards the Statute of H. 8. of Maintenance, supposeth that Informations still lay; and if it had been a new Thing, that Act would have said, that there shall be an Information for that Crime; and not that it shall be punished by Information, which supposes Informations to lie before. The Star-Chamber Court was taken away, because the Offences were punishable here; but generally a Crime committed in York cannot be punished in B. R. by Indictment, for it cannot be removed out of the County, where all Indictments must be laid; therefore it is only punishable here by Information. In the Books of Entries there are Informations for Perjuries and Intrusions, against the Bailiff of Westminster and Keeper of the Gatehouse, and yet they are no Officers of the Court: And you could never move to quash an Information against the Attorney.

All the Court were of Opinion that the Information did lie.

The King *versus* Roberts. Pasch. 4 W. & M.

**I**N an Information against the Defendant for oppressively taking and extorting from divers Subjects, several Sums of Money, exceeding the ancient Rate and Price for Passage over a River, setting forth the Prices taken for Men, Horses and Cattle, &c. And the Defendant being found Guilty, it was moved in Arrest of Judgment, that the Information was too general and uncertain, because it did not mention any particular Persons ferried over, or from whom the said Prices were taken.

( 3. )  
Carthew  
226, 227.  
1 Show. 396.

By Holt C. J. In every such Information, a single Offence ought to be laid and ascertained, for every Extortion from every particular Person is a separate and distinct Offence; and therefore they ought not to be accumulated under a general Charge, as it is done here, because each Offence requires a separate Punishment, according to the Quantity of it: And it is not possible for the Court to proportion the Fine or other Punishment, unless it be singly and certainly laid. It is true, all Informations in the Exchequer are general, as this is, but the Reason is because they are for certain Penalties inflicted.

1 Cro. 438.  
1 Sid. 91.  
2 Leon. 38,  
39.

The Judgment was arrested.

The King *versus* Gaul. Hill. 10 W. 3.

**A**N Information by the Attorney General on the Statute of Ed. 6. for buying and selling live Cattle, not having kept them the Time the Statute appoints, was brought against the Defendant, whereby he had forfeited double Value. It was here insisted, that the Information would not lie in this Court, and that the Buying and Selling being in N. it ought to have been brought there, and not in Middlesex, by the Stat. 21 Jac. 1. On the other Side it was said, that the King's Bench is not restrained, and that the Attorney General may exhibit Informations here for the King, notwithstanding the Statute.

( 4. )  
1 Salk. 372,  
373.  
Carthew  
465, 466.

The Court, upon reading both the Statutes, was of Opinion, that as it was clear the Defendant might have been prosecuted at the Sessions, by way of Indictment upon the Statute 5 & 6 Ed. 6. therefore this Case was plainly within the Restraint of the Statute of 21 Jac. 1. and against the express

5 & 6 Ed. 6.  
c. 14.  
21 Jac. 1.  
c. 4.



express Words thereof. And it hath always been ruled, that this Act doth not extend to any Penal Laws, upon which the Prosecutions can only be in the Superior Courts at Westminster.

Cro. Eliz.  
645.  
Style 340.  
3 Lev. 71.  
2 Keb. 401.

And here Holt C. J. said, Ten Judges had agreed in the following Resolutions: That all Informations and popular Actions on penal Statutes made before the Act 21 Jac. 1. must by Force of that Statute be laid, brought and prosecuted in the proper County where the Fact was done: But that Prosecutions on subsequent penal Statutes, are not restrained thereby; for that Act is as to them, as it were repealed. Though the Chief Justice declared his own private Opinion was, that where any subsequent Statute gives any popular Action, it must be laid in the proper County, within the Equity of 21 Jac. 1.

Trin. & Hill.  
11 W. 3.  
1 Salk. 374,  
367, 371.  
Cro. Car.  
252.

By Holt C. J. Where a Matter concerns publick Government, and no particular Person is so concerned in Interest as to maintain an Action, Information will lie; and in Case of a Corporation, it may be granted against particular Persons, to try a Right, &c. In an Information, if the Defendant comes in upon the first Process, he has an Imparance of Course; but if upon the Attachment, he must plead instant: So if he be outlawed by Process, and comes in and reverses the Outlawry, here he must plead instantly to the Information.

The King *versus* Dummer. Mich. 11 W. 3.

(5.)  
1 Salk. 574.  
2 Salk. 514.  
Mod. Cases  
168.  
2 Show. 12.  
Far. 101.  
3 Mod. 343.  
Cumb. 460.

**M**otion for an Information against Dummer, for Perjury committed in a Trial, in answering this Question, Whether he had received 800 l. for passing his Accounts?

Et per Holt C. J. If the Question had been fair, we would have granted an Information; but this Question was in effect, Whether he was guilty of Bribery? You may indict him, but we will not grant an Information.

Regina *versus* Turvy and others. Hill. 7 Ann.

(6.)

**A**n Information set forth that Gilbert Pasmore died Intestate at Hampstead in the County of Middlesex, and that the next of Kin was Edward Pasmore, &c. and that he only was intitled to the Distribution of the Intestate's Estate,

state, and that the Defendants endeavouring to get half the Intestate's Estate, and to get Administration, did conspire, suborn and solicit R. H. to make Affidavit, and affirm before a Justice of the Peace, that Edward Palmore, the Father of Edward and Gilbert Palmore, did marry a second Wife, and that this was done with Intent to get it registered and certified; and further, that they did give, pay and deliver 5 l. to R. H. & diabolice promised to give him 10 l. more pro inde.

The Defendant being found Guilty;

Sir Edward Northey moved in Arrest of Judgment, The first Part of the Information is laid to be done by three, but not by the Wife. They have laid two Faults, which were committed in several Counties, in one.

It is too general; it is for conspiring to get half the Estate, and get Administration granted, which is not a Conspiracy in any Man, when it is but to try his Right. They set forth that three did suborn and persuade, &c. but do not say quilibet eorum. It being for Words, one cannot speak for another. It is, that they did procure R. H. to take a false Oath before such a Man, and they do not set out the Words. It is coram aliquo iudiciario, but it is not shewn what Oath, nor before whom taken. As to the Intent, that is nothing; for it cannot be tried to what Intent a Man suborned.

Powell J. If they have not laid a Fact done, or a Conspiracy to do that Fact, it is a fatal Exception.

Eyre: There is not any Oath set forth; but a bare Solicitation, and a giving of Money is a Crime, though no Oath is taken; as lying in wait is an Offence, and indictable, though no Fact is done.

Holt C. J. To persuade and solicit is a Crime, but that is not the Crime laid here. He is found guilty of the whole; but if he had been found guilty of the Persuasion, it may be that would have helped it.

Powell J. If the Persuasion was in Middlesex, and the Perjury in London, they cannot have a Venire out of both, but if in any other County, they might have joined.

Holt C. J. I question (make the best of it) whether this is Subornation.

Powell J. Then they should not have laid Subornation.

Holt C. J. Yet it is good for the Rest; and it is laid that the Oath was taken before a Justice of Peace.

Powell J. It is an extra-judicial Oath, for the Justice had no Power to take it.

Adjournatur.

# INN-KEEPERS.

Gilbert *and* Berkeley. Trin. 8 W. 3.

(1.)  
Skin. 648.

**A** Man had an Horse in an Inn, and came thither, and directed that the Inn-keeper should not give him any more Food, for he would not be responsible for it. The Question was, if for the Food given by the Inn-keeper to the Horse after this Direction, the Man who brought the Horse thither shall be charged or not.

And Holt C. J. directed, that this was not a Discharge; for then the Inn-keeper might be deceived. And it is the lessening of the Security of an Inn-keeper, who may detain, and by the Custom of London sell the Horse for his Keeping.

Parker *versus* Flint. Mich. 10 W. 3.

(2.)  
Cases W. 3.  
255.

**I**f one comes to an Inn, and makes a previous Contract for Lodging for a set Time, and does not eat or drink there, he is no Guest, but a Lodger; and as such is not under the Inn-keeper's Protection: But if he eats and drinks there, it is otherwise; or if he pays for his Diet there, though he does not take it there. And a Sign is not essential to an Inn, but is an Evidence of it.

# INQUISITION.

The Queen *versus* Watton. Hill. 2 Ann.

Mod. Caf.  
95.

**I**n the Caption of an Inquisition it was said, Juratores jurat & onerat super sacramentum suum, &c. And to this Counsel excepted, for that it does not appear what the Jury were sworn to do, whether they were an Inquest of Inquiry, or a Petit Jury?

Holt



Holt C. J. I have known Inquisitions quashed for want of the Words *ad inquirendum*; but since it is here a particular Offence, and at the Suit of the Party by Statute, by my Consent none should ever be quashed for it. In an Indictment it is never mentioned what the Jury is to enquire of, but only *ad inquirend. pro Dom. Reg. pro Corpore Com.* And as to the Want of these Words, in Case of a Petit Jury, you only say, *Elect. triat. & jurat.* without saying *ad triandum exitum*. And in this Case it does appear, that they were sworn to present, for there is no Issue joined; and the Reason why in a Presentment at the General Quarter-Sessions it is necessary to say, *Ad inquirendum pro, &c.* is, because their Commission is such, and the Jury must enquire according to the Commission; but here their Commission is by a Statute concerning forcible Entry: And if it were an Indictment for a Riot, upon the Statute of H. 4. 13 H. 4. c. 7, without the Word *inquirend.* it might be held well.

Per Cur: The Inquisition was confirmed.

## Joinder of Actions.

*Saracini versus Kilner.* Pasch. 6 W. & M.

**P**ER Holt C. J. Where several Actions are brought for several Causes, the Court may compel to join them in one, where they may be joined; but where several Pleas are requisite, as in Assumpsit and Trover, they cannot be joined. (1.) Com. 244.

*Barton versus Bartlet.* Trin. 12 W. 3.

**F**OUR Persons were arrested upon one Writ, and put in Bail severally; one of them non-prossed the Plaintiff for want of a Declaration. (2.) Cases W. 3. 405.

Holt C. J. Till they are sever'd by the Declaration, the Writ shall be intended joint; and the Non-pros' before the Declaration must be upon the Writ, which is joint, and therefore one Non-pros' will do for all, notwithstanding the several Bail.

Join-

## Jointenants and Tenants in Common.

Ward *versus* Evans. Trin. 7 W. 3. Rot. 1718.

(1.)  
5 Mod. 25.  
S. C. 1 Salk.  
390, 391.

**I**N Replevin the Defendant makes Conuſance as Bailiff to C. H. and E. I. and ſets forth, that Sir Robert Carr in 1638 was ſeiſed of the Locus in quo, &c. in Fee, and did by Indenture grant and demiſe to C. H. and E. I. (and three others now dead) an Annuity of 100l. per annum, to be equally divided among them (viz.) 20l. to each, Habend' the ſaid 100l. to them and their Aſſigns for their Lives, (viz.) 20l. to each of them reſpectively, and to be iſſuing out of the Locus in quo, &c. and that he did further grant, that if any one of the five died, the Annuity of 20l. payable to ſuch ſhould be paid equally to the other four; and ſo if two died, and if three died, that the two Survivors ſhould have 50l. each, but that there ſhall be no Survivor of either of their Parts; and farther, that if any Part of this were arrear, that they might diſtrain; Virtute cujus the five were ſeiſed of the Annuity of 20l. each; and being ſo ſeiſed, three of them died, and that their Parts ſurvived to the two living, and that the Annuity was in arrear for ſeveral Years, the Ar-rears before the Death, and ſince, amounting in the whole to 2200l. and for 40l. the Defendant makes Conuſance. To this the Plaintiff pleads in Bar; on which Iſſue is joined, which is found for the Aſſuant. Now it was moved in Arreſt of Judgment, that this is no good Conuſance, becauſe the Defendants are Tenants in Common of this Annuity, and therefore one Conuſance cannot be made for both, but it ought to be ſeveral for each of them. The only Queſtion is, if a joint Conuſance can be made for Tenants in Common?

1 Salk. 390,  
391.  
S. C. by the  
Name of  
Ward *verſus*  
Everard.

Judgment was given Hill. 10 W. 3. per Holt C. J. the Words equally to be divided cannot make a Tenancy in Common in a Deed, though they may in a Will; and the Words to have and receive 20l. a-piece, are an Explanation how the Money on Receipt is to be diſtributed, (viz.) ſo much to one and ſo much to another, but do not ſever the Grant nor the Rent; for it is not ſeveral Rents, nor ſeveral

Grants, but one Rent, and one Grant undivided. If they were Tenants in Common, then each of them must abow de quinta parte of 100 l. and not for 100 l. If one Coparcener grants a Rent of 20 l. for Equality of Partition to the other two, (viz.) 10 l. to the one and 10 l. to the other, they have but one Rent; and the (viz.) is but explanatory, 1 Inst. 169. b. which Case is not to be distinguished.

2 Roll. Abr. 90.  
4 Leon. 187.  
2 Cro. 259.  
Cro. Eliz. 330, 347.  
3 Mod. 209.  
3 Co. 39. b.  
Hertl. 29.

And Holt C. J. said, If a Man grants two Acres to A. and B. habend. one Acre to one, and the other Acre to the other, the Habendum is void and repugnant. Hob. 172. And so here, where the Grantor has granted one Rent; it is repugnant to the very Words of the Grant to make it several Grants of several Rents.

Judgment for the Abowant.

Fisher *versus* Wigg. Hill. 12 W. 3.

**L**ANDS were surrendered to the Use of three Persons and their Heirs, equally to be divided between them and their Heirs respectively: And the Question was, whether this was a Tenancy in Common, or a Jointenancy? (2.)

1 Salk. 391, 392.

Holt C. J. held it a Jointenancy, for the Words equally, &c. import as much. If a Feoffment be made of Lands to A. and B. equally to be divided, they are Jointenants; for they have the Land by one Title and Estate, and equally to be divided imports nothing but what was implied before: But if it be to A. and B. Habendum one Moiety to A. and the other to B. they are Tenants in Common, because they have several Titles, and there must be several Liberties; though if it were Habendum ten Acres to one, and ten to the other, it would be void for Repugnancy. As for the Word divided, that does not import a Tenancy in Common; for there the Possession must be entire, & pro indiviso; and to divide would be to destroy it. And though Tenants in Common hold by several Titles or Rights, yet the Possession of one is the Possession of the other. A Devise to two and their Heirs, equally to be divided, was formerly looked on as a Joint-Estate, now indeed it is an Estate in Common, not by Force of the Words, but that it appears to be the Intention of the Party, that there should be no Survivorship. Lastly he said, Jointenants were favoured; for the Law loves not Fractions of Estates, nor to divide and multiply Tenures and Services.

1 Inst. 184.  
2 Roll. Abr. 89, 90.  
3 Lev. 373.  
1 And. 194.  
1 Vent. 376.  
3 Leon. 19.  
1 Leon. 113.  
Dyer 158.  
3 Cro. 330.  
3 Rep. 39.  
8 Rep. 104.



1 Roll. Abr.  
67.  
3 Cro. 434.  
Poph. 125.  
1 Saund. 151.

But the other Judges held this a Tenancy in Common, by Reason of the Intent of the Parties; and said, that it was here in the Case of an Use, which must be construed according to Wills, and especially it being a Copyhold Estate.

Judgment was given according to this Opinion of the other Justices.

*Turkerman versus Jeoffrys. Pasch. 6 Ann.*

(3.)  
A Man devised his Estate to his two Sisters Jane and Elizabeth, during Life, equally to be divided between them, and after the Decease of them, to the Heirs of Jane; held that Jane and Elizabeth were Jointenants during Life, and the Fee to the Heirs of Jane, but not to take during Elizabeth's Life.

**T**RESPASS, and a Special Verdict. The Case was, that A. being seised in Fee devised his Lands to his two Nieces Jane and Elizabeth, equally to be divided between them during their Lives, and after the Decease of them two, then to the Heirs of Jane; Jane dies, living Elizabeth: And the Question was, Whether Jane and Elizabeth were Jointenants by the Will, or whether the Heir of Jane shall have the Moiety now, living Elizabeth?

Byre for the Plaintiff. Elizabeth shall hold it during her Life; for if it be a Tenancy in Common, yet Elizabeth shall have the Lands by way of cross Remainder, 3 Co. 37. b. But I do take it, upon the Words of the Will, that they were Jointenants. It is true, if a Man devises his Lands to two equally to be divided between them, this would be a Tenancy in Common, not by express Words, but by the Construction of the Intent of the Testator; for such Words in a Deed would make a Jointenancy, because these Words do not make the legal Distinction between Jointenancy and Tenancy in Common. Wills are to be construed according to the Intent of the Maker; and here it does appear that the Testator did intend they should be Jointenants, and that there should be a Survivorship, for the right Heirs of Jane were not to take till after the Death of Jane and Elizabeth, and then they were to take the Whole, and not the Moiety; for if the Heirs of Jane were to take a Moiety, that would have been expressed somewhere in the Will; but as this Case is, if we do not construe this a Jointenancy, this might never take Effect, for if Elizabeth had died, living Jane, the Heirs of Jane could not take; and if they did not take eod. Instanti the particular Estate determines, they shall never take. Archer's Case, 1 Co. 66. b. 67. a, &c. But though it was a Tenancy in Common, yet it must be construed a cross Remainder, to make good the Intent of the Will. 2 Jones 172. Raym. 452. 4 Leon. 14.

Pengelly: The Words, equally to be divided, carry a Tenancy in Common, and subsequent Words shall not alter the Estate. It was objected, that the Remainder could not take till both were dead; there is no Prejudice in that, for then the Heir of the Devisor should have it by Descent; in the mean Time a Tenancy in Common is a better Provision for his Nieces than a Jointenancy. There can be no Implication of cross Remainders, but as the Estates fall they come to him in Remainder. If the Devisor intended to have them go by Survivorship, he would have done so directly, without going about by Way of cross Remainder. Here if the Moiety of Jane should go to Elizabeth, that will be a Disinheritance of the Heir at Law pro tanto, which is not to be done without express Words.

Holt C. J. The Reason why the Words, equally to be divided, in a Will make a Tenancy in Common, is, because it is taken to be the Intent of the Devisor. And now, since these Words do not necessarily imply a Tenancy in Common, and that the Intent of the Devisor seems to be otherwise; by the subsequent Words it ought to be construed according to his Intent, which seems to be, that they should enjoy the Lands whilst they lived, and after their Decease to the Heirs of Jane; you hazard the Devise if you make it a Tenancy in Common; for as Mr. Eyre says, if Elizabeth had died first, what would become of that Moiety? for a contingent Remainder, that cannot take Effect when the particular Estate determines, is void. Suppose Elizabeth had died leaving Issue a Son, living Jane, if that had been a Tenancy in Common, the Son of Elizabeth should have, which is directly against the Intent of the Devisor. As to have it a cross Remainder, it is an awkward sort of a Thing. The Case of Holmes and Meynell has prevailed, and is not fit to be stirred now.

Powell J. That Case never went down with me, though affirmed in a Writ of Error; and I have heard learned People speak against it. If this be a Jointenancy, it will answer the whole; Estates are not to be raised by Implication, unless that Implication be necessary.

Holt C. J. Since the Statutes of Wills, the Intent of the Devisor has been the Rule for Constructions of Wills, and Words necessary at common Law, as Heirs, are not necessary. Trin. prox. it was adjudged to be a Jointenancy, per Cur'.

## I R E L A N D.

Coot *versus* Lynch. Mich. 10 W. 3.

5 Mod. 421.  
S. C. 1 Salk.  
361.

**T**HE Question in this Case was, Whether a Judgment given here (B. R.) upon a Writ of Error on a Judgment in Ireland, could be executed in England for the Costs? For that Execution had been taken out against the Party, who was here in England.

Holt C. J. Whatever Judgment the Court gives here must be executed in Ireland. Here can be no Testatum go into a Foreign Country; the original Judgment being given in Ireland, would you execute a Judgment by Piece-meal? Shall you execute an accessory Part of Judgment, when the principal Judgment cannot be executed here?

Rokeby J. Execution must follow the Nature of the original Action; and this Court is to send a Mandate to the Judges in Ireland, to see that the Judgment which was given here, be put in Execution there.

Holt C. J. I am of Opinion that this Execution ought to be set aside. Et per Cur: A Superfedeas went, quia erroneice, &c.

## Irish Forfeitures.

Annesley *versus* Dixon. Trin. 5 Ann.

(1.)  
Lands sold  
by the Trustees  
under the Act of  
Resumption  
as forfeited,  
though the  
same were  
not forfeited  
by the Rebellion of  
1688, were  
recovered in Ejectment by the Proprietor, and the Judgment affirmed in England,

**T**HIS Case was argued this Day by the Attorney General for the Plaintiff in Error, and he thought the Plaintiff should hold under the Title of the Trustees; for else it would be very mischievous, if what the Trustees have done by Force of an Act of Parliament, should be all unravelled, and the Purchasers have no Warranties, no Provisions nor Covenants but this Act; therefore it was plainly intended their Titles should not be



litigated nor contested; and if the Parliament did intend to leave Room for any Person to contend their Title, then there would be some Provision in Case of Evasion, but here is no such Thing; therefore I hope these Purchasers, who have given their Money upon the highest Security of this Nation, shall not lose the Benefit thereof without Recompence: And if this Act could be so intended, it had been made in vain, for we could never find Purchasers; for no Man would buy a litigious Title, without some collateral Security. It is objected, that this is an extraordinary Power; it is so without Question, but we have seen as great Powers given before: So is the Plantation Act, whereby the whole Plantation is vested in Trustees. And surely it was very necessary to give such a Power, for Papists never want Deeds and private Settlements upon Occasion to trump up, which is very frequently done by them; therefore when we consider the great Power, then we must at the same Time consider the Nature of the Thing. This Case, and the Encouragement it has met with, has alarmed a great many Purchasers; and if the Proceedings of the Trustees be unravelled, we know that will be of very ill Consequence, but we know not where it will stop. The Iniquity of this Case appears by the Special Verdict, and the Partiality used in this Case; for if any Question arises about Lands depending on the Act of Settlement, if the Lands were seized and sequestered, they never will admit any Special Verdict, though they will give a Bill of Exceptions, which signifies nothing, for being seized and sequestered makes a Title with them not to be controverted; and I take the Intent of this Act of Parliament was so here, that the Decree and Judgment of the Trustees should be final. There were two Objections made; first, Whether the Trustees had Power to determine what was vested in them? Secondly, Whether any Person could claim an Inheritance? As to the first Point, It is plain they had, by the whole Context of this Act of Parliament, a Power to determine what was vested in them; first, by their Power of summoning all Persons before them, &c. and for what? It was surely to enquire into what Estates were the forfeiting Persons, and what belonged to the late King James, which were already vested, and to register in Books, for that Purpose, such Estates and Interests so vested; then surely they are to determine what is vested; for I know not what Words could be invented to give them such a Power, if these Words will not do it, which are in the Act fo. 17, 18. And

this Clause is the Foundation, and the Rest are only subservient and directory; and if they had not Power to determine, why should the Words determine be in the same Clause, fo. 21. then there is Encouragement to any Discoverers, to whom the Chief Governor of Ireland was to give Money on their Certificates; and if they could not determine such Discoveries when made, then the Revenue of Ireland was to be given for nothing. It must also be intended that Mr. Dixon, the Lessor of the Plaintiff in the original Action, had sufficient Notice according to the Act; and besides that, he claimed, and his Claim was dismissed; and so by the express Words of the Act he was concluded; and the Trustees were Judges of Record, and therefore it must be intended they did right, according to their Duty, if the Contrary does not appear; then the Under-Lessees and Farmers were compelled by this Act to pay their Rents to the Trustees; which could not or would not be, if the Trustees had not a good Title by their Determination. Again, The Trustees by their Warrant could compel Sheriffs to give Possession to their Tendees. And so, upon the whole Matter, if the Trustees had not Power to determine, this whole Act had been both unjust and nugatory.

As to the other Point, which was an Objection made by Serjeant Broderick, that this Act did not allow any Person to claim an Inheritance, it is certain that any Person who claimed the Inheritance might come in on the Summons and Proceedings of the Trustees, or else they might claim; for in the claiming Clause these Words are, or any other Estate, and surely that shall extend to an Estate of Inheritance. I think that this Gentleman's Claim having been fully heard, and his Title determined according to the Methods prescribed by this Act of Parliament, that the pretended new found Title should not have been allowed to be given in Evidence. There is a Fault in the Special Verdict, for by the Act Rights of Entry and Rights of Actions are given to the Trustees, and they only find, That the late King James was neither seized, possessed or interested, or any one to his Use, or in Trust for him, at the Time of his Accession to the Crown; but do not say that he had not either Right of Entry or Right of Action, as they should do.

Sir John Hollis for the Defendant: If there be an Act of Parliament to sell Lands, and there happens a Dispute about the Title, is not this to be tried at the Common Law? So whether a Man be a Bankrupt, and what were his

his Lands, is triable at Law; so what Estates belonged to attainted Persons, and what to the late King James, is triable by a Jury; and this Act of Parliament does not by express Words alter the Law in that Point, and we shall, I hope, give it no equitable Construction against Magna Charta, because the vesting Clause does only give them Power to sell such Estates; it must be allowed that 'twas well done of the Trustees to sell such Estates as were vested in them; but I believe that no Man will say, that the Trustees might sell what Land they thought fit, which the Parliament did not think fit to give them; I know that for this Reason that Act was then and since by some thought defective, but the Parliament would never mend the same; therefore the Question being not here, what ought to be, but what is their Power; as I take it by this Act, it is like the Power given to Commissioners of Bankrupt; for the Trustees could never by this Act determine any Thing summarily, but what was vested in them, which is no more than what Commissioners of Bankrupt can do; the Commissioners of Bankrupt cannot sell till they know what they have; no more could the Trustees; so if we consider all the Power given to the Trustees by this Act, 'twill appear to be just equal to the Power given to Commissioners of Bankrupt. All the forfeited Estates, &c. were by this Act vested in the Trustees; but the Act did not thereby determine what Estates were forfeited, &c. nor who was attainted; as to the Encouragement to Discoverers, that makes nothing, because the Discoverers were not to be paid till Discovery was determined; and if the Lands were in them, they might convey them, and give Warrants to Sheriffs to put Purchasers into Possession.

Second Point; 'tis true, that Estates of Inheritance were to be claimed, &c. by this Act, but that was only to be by the Words and Sense of the Act; Reversions or Remainders upon particular forfeited, &c. Estates, or any Incumbrances or Charges upon them; for besides, what Sense could there be, if every Man, who had an Estate in Fee-simple in Ireland, should be obliged to claim his Estate before the Trustees, tho' he and his Ancestors were in Possession never so long; and then would it be in the Power of Trustees to determine every Man's Estate in Ireland, and say they did belong to the late King James, or to forfeiting Persons? This is so great an Absurdity, that I think no reasonable Man can suppose; and yet this is our Case, for the Special Verdict finds our Title, finds our Possession all along,



along, and until these Gentlemen went over, there's no Title found in the Trustees, but their own Judgment, which, I think, will give none, for our Claim gives no Title at all.

Attorney General: We agree, that claiming or not claiming makes nothing on the Case, for the Claim gives no Title; I do not think the Parity between the Power of Trustees and of Commissioners of Bankrupt will hold, for the former have a Power to determine, and then to sell; but the later have only a Power to sell.

Holt C. J. Is there any Thing vested in the Trustees but those Lands, &c. which were forfeited, and those which did belong to King James? Surely no; then 'tis reasonable for the Trustees to have Power to send for Persons, Papers and Records, to reduce these Forfeitures to a Certainty; but surely that cannot by any Construction be intended a Power to them to determine what Estate, and what Lands were in them, and what belonged to other Persons who did not forfeit; but 'tis reasonable that those who had Incumbrances, &c. Reversions and Remainders on particular forfeited, &c. Estates, should claim. I think the Finding in the Special Verdict good enough.

Powell J. Surely the vesting Clause did vest no more in the Trustees than what was forfeited, or did belong to the late King James, and if these Lands were not vested, nor did belong to King James, then they were not vested in the Trustees; and if they were not vested, then they could not convey the same to Mr. Annelly; as to the Mischief to the Purchasers, 'tis true, it may be great, but it may be a very great Mischief and Injustice, if the Trustees sold People's Land, because they said they did belong to a forfeiting Person, or to King James. Caveat emptor. All the Lands of forfeiting Persons are in the Crown by the Law of the Land, but then there must be an Office of Information, which is traversable; if we take the Commission here given to the Trustees, as to this Point, to be in Lieu of such Office, as I think it can be no more, then surely 'tis and ought to be traversable.

Powys J. said, That the Mischief would be so great to the Purchasers, and the greatest Security of the Nation so lessened thereby, that 'twould be of very great and dangerous Consequence, if this Judgment stood; and he did very much believe, that if this Judgment stands, no Purchaser will be safe, for at least 1000 Actions do wait on the Success of this Cause; and Papists will never want Deeds

and Settlements to trump up to serve their Turn, and by that Means this Act of Parliament, which was designed for good Ends, viz. to raise Money and quiet the Kingdom of Ireland, will have a quite different Effect, viz. to deceive all those who purchased under it, and enforcing almost the People of England to give a Tax to pay this Money back for the Support of the Credit of the Nation.

Could I. Would say nothing till the next Argument.

Annesly *versus* Dixon. Mich. 5 Ann.

SIR Thomas Powys, for the Plaintiff in Error, hoped the Judgment would be reversed; for the Question is now, Whether Dixon having entered his Claim, and being dismissed by the Trustees, shall be admitted to bring his Claim and set up the same Title, and that a Jury shall try the same Fact which was before settled by the Trustees; and whether now after the Sale this will be admitted and controverted, which ought to be settled before the Sale; if such a Thing could be imagined then, or there had been any Ground for such an Opinion, I do believe our Act here had been made in vain, for we should get no Purchasers; and so the Publick would lose what was designed by such a beneficial Act, which brought us in 800,000*l*. Now the Question remains, Whether they could determine what was vested? and I think they could from the Necessity of the Thing, from the Mischief that otherwise must follow, and from the Words of the Act of Parliament; from the Necessity we are to construe Acts of Parliament by the Preambles. Now by the Preamble we are to expect a great Deal of Money by the Sale of the Irish Forfeitures; and how could that be expected, if the Trustees could not make a Title to the Purchasers; next 'twas reasonable and necessary that such Power to determine what was forfeited, and what was vested, should be lodged somewhere, and we know of none, therefore it must be in the Trustees; besides, the Trustees had Power to determine Incumbrances, therefore 'tis more reasonable that they should have Power first to settle such Estates on which the Incumbrances were, and which were subject to the same; how could they determine the Incumbrances, if they could not settle the Lands which were subject? And 'tis not reasonable that they had Power to determine Part, if they could not determine the Whole; because 'twas more reasonable and necessary that

(2.)

the Trustees should have Power to settle the Whole, because they were armed with an extraordinary Power to find out the forfeited Lands, because the forfeiting Persons kept their Deeds and Titles, so that the Purchasers nor even the Trustees could have them; but the Vendees were to have a good Title made to them, and how will this be at this Rate? The Purchasers were and are supposed to be Englishmen, and by the express Words of that Act of Parliament are to be Protestants, and the Persons that forfeited were Papists; in what Condition are such English Protestants now, if this Judgment should be affirmed, when Papists may be Jurores in that Kingdom at this Day? We may guess what Equality such Purchasers will have there in such Case, and we know that venomous Beasts will not live in that Country; yet there's as much Perjury and Forgery there as in their neighbouring Countries; to prevent which 'twas necessary the Vendees should have a good Title, which could not be if the Trustees had not a Power to determine what was forfeited. The Purchasers by this Act were to pay their Money into the Exchequer there, before they could have any Conveyance; and by this Act they were only to have a bare Deed of Bargain and Sale, without the usual Covenants; which was thought and made sufficient by this Act of Parliament against all People but such whose Claims were allowed them by the Trustees; how then shall these Purchasers, if you take their Land from them, have their Money back? I see no Way, nor no Remedy for them; it has been objected that such Power would be exorbitant and too great to be given; but this Objection is of no Weight, if we consider that 'twill go to all Powers, to Judges, Juries, &c. for such a Power must be somewhere, and where could such a Power be lodged with more Safety to the Publick than where 'twas, viz. in the Trustees who were chosen by the King, Lords and Commons; they were then known Persons, they had Rewards given them, which kept them beyond Corruption; they were on their Oaths; they were not to buy or purchase, or any one for their Use, or in Trust for them, any Estate or Interest in or to any Lands in Ireland, which was vested in them by this Act; so that there was all the Reason that human Prudence could foresee, to satisfy, that such Power was well reposed in the Trustees, and they behaved themselves so well, that this is the first Complaint which has been regularly made against them, so that we have all Reason to be satisfied with them; besides, the Com-



missioners who were at first sent over to enquire into the several Forfeitures, and the Grants made of them, who were to make a Registry of all the forfeited and other Estates in Ireland, which were to be vested by this Act, was a sufficient Notice to all Persons, so. 17 & 18. of this Act; how could they make such a Registry if they knew not, or could not determine what was forfeited, or the Persons forfeiting? As to the Incumbrances, now every Person had Notice that was in Danger; then the next Thing to be done was to claim, for which they had sufficient Time allowed them by the Act; but here 'twas objected, that 'twas very hard that the Judgment of the Trustees should be final, and that no Appeal or Writ of Error should be, &c. That is not hard, as they make it, because we have frequent Examples of such Acts of Parliament, whereby summary Proceedings are warranted by Justices of the Peace, &c. and such was the Power given by their own Act of Settlement in Ireland, whereon no Man has ever heard of an Appeal, or Writ of Error brought; and I take it that this Act was framed by that; but to give a full Answer to this Objection, they do agree of the other Side, that a Power was given to settle Incumbrances; why may it not be so in Land? when the Incumbrances may be of as great Value, if not more than the Lands; and is there not as great Regard to be had to those whose All consists in Incumbrances, as to those who have Lands? So that we see that the Gentlemen of the other Side indvigh against a Power which they admit; and if there had been any further Appeals from their Judgment, no Man would purchase till they were determined, for no Man would buy a litigated Title; but here every Body by the Registry knew whether he was grieved, for the Registry was a Sort of interlocutory Judgment; then they were to claim, for which they had full Time and a fair Hearing, and if they were wronged, they might apply to the Parliament, which then was frequent, and which every Man knew would be so; and we have heard no such Complaints against them, and if there had been any Cause for it, we should have heard before now. If this Action should be or go against us, the Mischief would be, that this Act of Parliament, which was made for very good Ends, would be evaded and rendered useless, but such Construations are not to be made of Acts of Parliament. Hob. 93. and 97. in Moor and Hulseys Case; and Lord Coke says, *Mal-dicta expositio est quæ corrumpit textum*; and in another Place

Place he tells us, *Viperina expositio*; and if that be so in any Case, 'tis so here, for this whole Act would be avoided, which was made for such good Purposes; for tho' the Incumbances be bound by the Judgment of the Trustees, yet they may bring their Actions and say, that the Lands which were subject to their Incumbances were not forfeited; so that no Purchasers under this Act are safe, because that every Person will directly or indirectly avoid the Judgment of the Trustees. Would not this make the whole Act illusory, the Mark for every Body to shoot at? for I know of no other Limitation of Ejectments; and this in the Case of innocent People and English Protestants, subject to Popish Injuries, &c. which I said before, surely no Man will say, was a Design of such Act; but such will be the Consequence, if such Construction as they would have will stand. The Trustees were armed with an extraordinary Power; they could send for any Person in that Kingdom; they could examine them upon Oath; they could send for Evidences, Deeds and Writings, and keep them as long as they thought fitting, &c. and all this was to find out the Truth of what Lands were forfeited, and what Incumbances, &c. were upon them; and was this extraordinary Power given them to no Purpose, if they could not determine, unless it was to deceive Purchasers? Either the Parliament should make the Judgment of the Trustees final, or else they should transmit this extraordinary Power to their Clerks; and if neither, then I must say, that this is the most dishonourable Act of Parliament, or Construction upon it, that can be thought on. Mr. Dixon has himself claimed the Lands, and has been allowed in Part, and disallowed for the Residue; yet, I believe, he thinks himself safe under the Trustees for the Part which they have allowed him by the express Words of that Act of Parliament; the Decree of the Trustees is to be final and binding against the said Trustees and their Heirs, and against the King, his Heirs and Successors; and would it not be very mischievous and absurd, that the Judgment of the Trustees should be final and binding one, and should have no Force the other Way? Besides no Writ of Error nor Attaint lies, unless the Matter or the same Evidence, which appeared on the original Action, be then to be had; and that is founded upon great Reason, and great Justice and Equity, because the first Judgment shall not be condemned, unless the Motives and Inducement whereon the same was grounded appear, when that is re-examined, for that

that possibly there was a good Motive to give the first Judgment, which does not appear in the Re-examination; and that is the Reason, if one of the Witnesses dies, the Attaint fails. 1 Roll. 285. Now that is our Case; the Trustees were armed with very extraordinary Means, to send for Persons, Papers and Records, to examine Persons upon Oath, to examine other Men's Deeds and Writings, and so might have great Reason for judging this Society of Tippenan to have been of the D. of York's Estate (and we are the more induced to believe it, for that the Lessor of the Plaintiff says in his Claim, he would for his Peace sake purchase it). Now the Defendant in Ejectment has no such Power, no such Reason and Proof for him as the Trustees had, and is put in this Action to plead the General Issue.

Lastly, I think that, by the Words of the Act of Parliament, this Power is given to the Trustees to determine what is vested; they are to declare what is forfeited and vested; for with Submission, the Words of an Act of Parliament are to be liberally construed *supra totam materiam*, and not like Words of the Parties in Grants or Deeds, which are to be most strongly taken *contra proferentes*; 'tis true, there are no express Words for them to determine what is vested, but they are to declare what is forfeited, and consequentially to declare what is vested; for all the forfeited Lands are vested in them by this Act, and this not by any express Words, but taking all together. If this be not so, to what Purpose had they all this extraordinary Power to send for Persons, Deeds and Writings? this must be to some Purpose or End, for the Benefit of the Publick, that did employ them, for no Body else could be the better for it, nor even the Publick, unless their Judgments were to be final; then they were to register, what? As well the Inheritance as the Incumbrance; all the Estate in the Lands, and also particular Estates, Reversions, and Remainders; so that they were not to register Part, but the Whole; then naturally comes immediately after the Saving for innocent Persons to claim, not only Incumbrances, but also the Possession and Inheritance; the Words are not, that they shall claim the particular Estate, Reversions, Remainders or Incumbrances, but they may claim every Thing in the Premises, and Premises is every Thing put before, viz. all the Estate and Interest in Lands, all the Estate therein. Now, I say, whatever the Party could claim by this Act, the Trustees had a



Power to determine. If an innocent Person had a Power to claim, and they determined, and could do so by this Act, then certainly the Trustees could determine it; the Act goes on in the same Place, fo. 27. and says, every Person, which does not claim, his Right shall be extinguished and gone; so that Clause of Claiming is Universal, and Lands vested shall be taken to be what is registered, until it be taken out by the subsequent Claim; so that the Word vested shall not be taken to be absolute at first, until the Claims be determined; and therefore Hobart, with a great Deal of Reason, says, that Words cannot be written or spoken at the same Time, tho' they were at the same Time imagined by the Author. Every Person was concluded by the Judgment of the Trustees, Infants, Feme Coverts, Ideots, Persons beyond the Seas; therefore surely their Judgment must be final; and I must again insist upon it, that where-ever any Person could claim by this Act, the Trustees could determine. As for the Cases of Commissioners of Sewers and Commissioners of Bankrupt, I think they are not at all applicable to this Case, for they are no Judges, 8 Co. 1. 21. a. nor are they any Court of Record, but the Trustees were Judges of Record, and had full Power to hear and determine; so we may distinguish this Case from the Case in Hardr. 478, 480. (which Case is not there adjudged, quod nota,) because the Commissioners of Excise there had no Power to judge what Liquors were exciseable; otherwise if they had judged Small Beer to be Strong, for there they had Jurisdiction; but here the Trustees were Judges of what was forfeited; and if not, then several other Clauses, as I said before, would be absurd; as the Clause that gives them Power to give treble Damages if any Waste be done in the forfeited Lands; and how can that be, unless they can determine what those Lands are? Lastly, If this Power is not expressly given in terminis in the Act, yet it is at least necessarily implied, as sine quo res ipsa subsistere non potest. Hob. 234. Therefore if the King gives by his Letters Patent Lands *provis hominibus* of Illington, rendering a Rent, this is an Incorporation to that special Purpose; therefore here the Trustees, if they could not determine what was forfeited, they could determine nothing; so that even what is agreed of the other Side, that their Judgment was final as to Incumbrances, particular Estates, Reversions, Remainders, could not be so, unless they could determine what was forfeited; and I take it that the Finding of the Jury shall not be taken

here to be the Truth, for they are estopped by the Decree of the Trustees; as if Trover be brought for the Goods that belonged to a Feme before the Coverture; if, before this comes to the Jury, the Marriage is dissolved in the Ecclesiastical Court, or the Lawfulness of the Marriage was determined there, this should conclude the Jury; therefore since this Point has been determined by the Trustees who had Jurisdiction thereof by this Act of Parliament, I hope that Juries will not be let in to undo poor innocent Purchasers, for which Reason I hope the Judgment will be reversed. It being late, the Case was put off till the next Day.

Serjeant Weld for the Defendant: I do agree with my Brother Powys, That if the Trustees had Power by this Act before, that the Jury ought not to be admitted to try it again; for the Judgment of the Trustees was final in such Things, whereof they had Jurisdiction; but the Question between us is, Whether the Trustees had a Power to determine what was forfeited; for if they had not, then what Judgment they gave was *coram non iudice*, and void; for if they had not Power they could not judge. I shall only speak of the Duke of York's Estate, which is now the Point, for we have no Dispute now about the forfeited Estates; in the Act fo. 9. 'tis declared what should be vested, and that was what King James II. at the Time of his Accession to the Crown of England, was seized or possessed of, or any other Person in Trust for him, or to his Use. Now that was a notorious Thing, and not so long since, but that several Persons could prove what that was, and whatever that was, 'twas vested, and no more; then comes fo. 14. Where the Trustees were to swear they would not purchase any Part of the Lands vested; yet at this Rate, and by my Brother's Construction, they might purchase great Estates in Ireland, and yet purchase no Part of the Lands vested; they might purchase all my Client's Estate, yet not break their Oath; then the claiming Clause says, they shall put in their Claims to all the Lands vested by this Act; then the Clause that impowers them to sell, says only they shall sell and dispose of all the Lands vested; so that all the Powers and Authorities given them by this Act is over the Lands vested, and not one Word in all the Act does give them Authority to determine what is vested; but if it be vested, then they have Power; 'twas said, that if we could claim, they could determine. To that I can say, that all the forfeited Lands in Ireland were in the Trustees  
by

by this A<sup>t</sup>, and they had Power to determine of them, and of no other; and if I claimed from them where they had no Jurisdiction, their Judgment for me did not mend my Title; no more could their Judgment against me do me any Hurt; but if 'twas a forfeited Estate, or was belonging to the late King James, then they had Jurisdiction; so that 'tis plain that this A<sup>t</sup> gave them a limited, and my Brother would give them an absolute Power. The Lands did such a Day belong to J. S. yet the Trustees might at this Rate, by Matter ex post facto, say 'twas forfeited, and so vest this in themselves. The A<sup>t</sup> of Parliament did vest the Duke of York's Lands, and the forfeited Lands in these Trustees; but by my Brother's Construction, they shall vest the Lands of all Ireland in them, and that by Colour of this A<sup>t</sup> of Parliament. This Construction sure would be as mischievous and more than the other; if the A<sup>t</sup> was thus to be construed, I think 'twere better to send over a new Colony into Ireland, and turn them all there out of their Estates, than to give a Power of doing it in effect under a Pretence of Justice; this would be like the Fox in the Fable, who would not come to Court for fear his Ears should be said to be horns; but say they, Mr. Dixon has claimed, and has admitted the Jurisdiction of the Trustees, and therefore now he shall be concluded; truly if that should be thought a Reason, 'twould be a pretty hard one; first, because the Trustees turned him out of Possession, therefore I think he should complain to them; his Possession was undisturbed till they came, then he complains to them and sets forth his Claim; and in all his Claim he does not say nor admit, that the late King James had any Right, but he shews that one Sir William Talbot, who was a very busy Sort of a Man, and who was a Gentleman to the Duke of York, made a Lease of these Lands which the Trustees decreed against my Client, but no Possession ever went along with such Lease; nor does he allow either by Implication, or by express Words, that the Duke of York or any concerned for him, had any Right, as my Brother would insinuate; and for this I submit my self to the Claim, which also is found in the Special Verdict; so that 'twas fit for him to complain to the Trustees who turned him out; but if he had no further Remedy, and if all the People of that Country had no other Remedy in such Case, 'twould be very hard, to have recourse only to those who wronged them; so that the People there, if our Claiming gives them Jurisdiction, were in a very bad Way; for if they



they claimed, then they admitted their Jurisdiction, and so were concluded by their Judgment; if they did not claim, then they were concluded also; for their Right was gone, says my Brothers, if they did not claim. This is a meer Juggle, like cross I win, pile you lose; but they have no Power but what is given them by this Act, and this Power was not given; therefore 'tis like an Appeal of Murder brought in the C. B. or a Fine levied in this Court; for tho' they are both Courts of Record, yet their Proceedings in such Cases would be coram non iudice, and void; so is the Case of Terry and Huntington, Hardr. 480. and the Lord Leicester's Case in Plowden's Commentaries, which are both very applicable to this Case, for that the Trustees had no Power to judge what was forfeited, or what was not, for the Act of Parliament did determine that Point; therefore whatever Judgments they gave upon that Matter are void; 'twas objected by my Brother, and much insisted on, that their Ways of Judgment, and the Ways they had were very different from that which a Jury can have; but what I said last will answer that, tho' in Truth, I do believe, the Ways they took were past finding out, and 'twould be very proper perhaps to bring them to light.

Mr. Attorney General said, when he argued on the other Side, this Act would be impertinent, and my Brother said 'twas very dishonourable, unless this Act did give Power to those Trustees to dispose of all this Kingdom, for so far their Construction would carry it; and we are now to thank them that they have not done it; for they might do so by their Construction, and warrant it when they had done; would not this be a mischievous Construction, that because they have a Power over forfeited Lands, they must also have Power over innocent Estates too? and this they say is necessary to secure Purchasers: Surely 'tis no new Thing in our Books, or Experience, to hear of Forfeitures in other Countries as well as this, and there have been Purchasers found out, without this extraordinary Method to secure them; and can there be no Way to secure them, but by making these Gentlemen (who possibly were honest enough) have Power of disposing of the Estates of all the Innocents in that Kingdom? But I take it there was no Necessity for it, nor for Deeds or Writings neither; for if there was a Possession in forfeiting Persons, or in the late King James, when he came to the Crown; that was enough to give them Power and Jurisdiction; so

Deeds and Covenants are not necessary to give a Possession, which is a notorious Thing, and easily known, being so lately in every Man's Memory; therefore these extraordinary Powers are not at all necessary to be given. They tell us of several Acts of Parliament that give Power to proceed summarily, but they do not tell us what they are; but I say there is no such Act, nor never was such Power given without express Words at least; and tho' there may be such Acts, yet they concern Chattels only; but a Man's Freehold and Inheritance shall never be divested without very strong and express Words. There's the Act for the Building of London; this gave Power; but yet if a new House was on Part of the old Foundation, and partly on my Ground, the Persons impower'd by that Act could not justify such Building, for that was out of their Jurisdiction; and that was to be tried at Law: So here, as to what my Brother says of the People of the Country, I must differ with him; for I think they are a very honest Sort of People, and he should say so too, for they might have found a general Verdict against the Defendant; and if so, then my Brother might have something to say of them; but here they found the Matter at large, and refer the Matter of Law to the Court: My Brother says, 'twas necessary to raise a great Sum of Money; but I think 'twould be very dishonourable, if the People of England would raise it out of the Innocents Estates; then my Brother says, Papists are Jurors there; I say all the Sheriffs there are Protestants, and they will not, nor are they admitted to return a Jury of Papists. My Brother said, that all Power is arbitrary, I say so too, but that is in the dernier Resort, King, Lords, and Commons, and that by Steps too; I hope he will not put these Gentlemen in the same Rank, and any Seven of them; if I am to find out, by all Means, the Estate of John of Styles, and to sell it, does it follow that if I am falsely informed, and I sell that Ground on such Information, is this Binding? surely no; why then should not the Information of the Trustees be liable in this Point to a Scrutiny? My Brother says, the Word Premises in this Act compriseth all; which I deny; for the common Case is against him; for if I let a Piece of Ground, and set forth the Abuttals, this would be *Viperina Expositio* with a Vengeance; then they shall not be vested till the Claims are heard, that will be as bad; and I am sure my Brother's saying so will not make it so; but then he thinks that will not do, and says, they

they are vested by their Registry, and they are to be taken out by Claim; why then they might register all the Lands in the Kingdom; this I am sure would be *Viperina Expositio*; but my Brother, at last, comes to own there are no express Words for him, then he says the Power is given by Implication; for that I say, what I have before, that no such Power ever was or can be given by Implication, but by express Words, which are not here; my Brother says there is but this Complaint, then the Mischief is not so great, as my Brother seems to apprehend; but if there had been more, I doubt not but they should have their due and proper Remedies; therefore I pray the Judgment may be affirmed, for I am satisfied as to that, whilst we endeavour to support it, especially in Westminster-hall.

Sir Thomas Powis replied, I do agree with my Brother Weld, if there was no Jurisdiction in the Trustees, then their Decree was void; but the Question between us is, Whether they had such a Power, or not, which he has not, as I take it with great Submission, answered; he says we are to avoid arbitrary Power; in the main I agree with him, but I hope he does not mean Acts of Parliament; if so, I disagree with him; for every Act of Parliament is so, and so is this Act as well as others. I must then beg Leave to insist upon it; and my Brother has given no Answer to what I said, viz. That if any Man claimed, and his Claim was allowed, the King and all the People of England were bound by their Judgment, and might have their Remedy at Law; is not this the Juggle that I spoke of, and will not his Fable be applicable to the People of England, who give a Power to Trustees to act, so to conclude them, and leave the other Side at large? had not these Trustees Power to give away all the forfeited Lands, &c. in Ireland? And were not we bound, and why should they not have the same Power over the Innocents? These Trustees were thought to be indifferent, why then should they not have Power over the other Side? Have not Juries Power to take the Lives of innocent Persons? So that this Power which looks frightful at first, yet is very familiar when viewed at a nearer Distance. I do agree with my Brother, that all the Lands are vested by the Act, but they are ascertained by the Determination of Claims; the Case put by my Brother is very true; if I have Authority to sell the Estate of John of Styles; but if I have a judicial Power, 'tis otherwise; so is his Case of the Building of London, and all his other Cases. I say they had



had a Power of Judicature, which is to allow of Incumbrances, &c. which I say, and insist on with Submission, could not be, unless they could also judge of the Possession and Inheritance, which I take my Brother did not answer.

Powell J. You will allow there are no express Words that give any Power to the Trustees to determine what is forfeited, and that 'tis only by Implication.

Holt C. J. Brother, if you please we will reserve our selves till we argue it, when we shall deliver our Opinions the first Saturday of the next Term; but I hope, Brother Powys, you believe the Story of the Fox in the Fable will not influence us.

Annesley *versus* Dixon. Hill. 5 Ann.

( 3. ) **T**his Day this Case was argued, and the three Justices against Powys were for affirming the Judgment, and accordingly 'twas affirmed.

Gold J. said, That he thought the Power of the Trustees by the Act was negative, viz. that they had Power only over the forfeited Estates of the Lands belonging to the late King James in Ireland, which Lands were by this Act of Parliament vested in them; their Power to enquire which were those Lands, was only in the Nature of an Inquisition-Office; 'tis negative, and limited by the Preamble, because there 'tis shewn the Irish began a Rebellion, &c. therefore their Estates were forfeited in order to aid the great Expence this Kingdom was at in reducing those Rebels, and to that Purpose were vested in the Trustees; and the same Order was taken for the Estate of the late King James; this will not surely vest any other Estate than those mentioned; for the Estates of innocent Persons shall not be affected thereby; because 'twas not intended they should suffer; 'tis true, the Trustees had a great Power, but that was only over what was vested; but then 'twas said, that they have Power to determine what was vested, because they could not otherwise know what Lands they had; as to that, I think their Power was rather like an Office of Inquisition, to know the Certainty of the Lands, and their Power is over Lands vested only; and if they had any Power over any other Lands, 'twas by Implication only; and I am of Opinion, that no Act of Parliament can vest my Lands in them without express Words, and this at most is but by Implication, which is not sufficient; I

think

think it is doubtful, and therefore to be construed according to the Common Law, as it is held in *Fermor's Case*, 3 Co. 77. b. 78. a. *Terry and Huntington* is, I think, full for the Judgment, and I do believe the Makers of this Statute did only intend to vest the Lands of King James and the forfeiting Persons; and if they meant otherwise, they did not shew it in express Words; ergo affirm the Judgment.

Powis contra: The Trustees cannot be said to be an Inquisition of Office, for they are a Court of Judicature, and had an extraordinary Power given them, and there were great Reasons for giving them such a Power; for Ireland is a Country wherein Rebellions are very frequent, and once in every fifty Years the Roman Catholick Gentlemen have always had private Settlements, whereby they evaded the Forfeitures upon that Account; and therefore an Act of Parliament does take Notice thereof, for which you may see the Care that was taken in the Acts of Settlement and Explanation; and though both of them are much more uncertain than this Act of Parliament, yet they are held sacred by the Courts of Judicature in Ireland, and a Decree of their Court of Claims or Letters Patent are conclusive; and much more in this Case, for the Makers of this Act had the Consideration of these other Acts before them, therefore they gave their Commissioners the Trustees full Power to hear and determine, and the Steps they were to take clearly chalked out; this Act is much better, and more clearly penned, and I know not why it should not meet with the same Encouragement. The Trustees had a Power of Judicature, the Plaintiff *Dixon* in this Judicature claimed, and in his Claim he owns that *Sir William Talbot*, the Duke of York's Agent, did let to *Quinn*; so he does shew that it was a doubtful Point who had the Right; then they did hear and determine this Point upon full Debate, and the Act says their Judgment is final; if so, then there is no Reason to bring this Ejectment. But it is said, they have not a Power to determine what is vested; this I take to be one main Point; and the second Point is, if a Jury can enquire and find contrary to their Decree. To the first Point I say, that in every Clause of the Act they have a Power to determine what is vested; first by the claiming Clause, by as strong general Words as Counsel could devise, All Persons having any Estate, Right, Title or Interest, &c. surely this does extend to an Inheritance, and not to Incumbrances only, as they would object on the other Side; for it is not in Reason to be supposed but the Legislators

would take at least as much Care, that the Purchasers under this Act should be at least as free from pretended Titles, or real elder Titles, as from Incumbrances, which are perishable in respect of Titles, which may defeat the entire Purchase; and we should not presume that any Judges should or would do any Thing that was not fair, much less these Judges, who were Men of great Merit, and were chosen by King, Lords and Commons, and were Men of great Integrity, for we never heard of any Complaints of them before now. It is true, they cannot say that what they will is in their Jurisdiction, but they may say that these Lands did belong to the Duke of York, and upon hearing they may determine it; and we are to presume they did determine truly, and not the contrary; for this Court was armed with a sufficient Power, and did upon Debate hear and determine this Claim; and I think it hard that a *Verdict* should set aside a Judgment that was given upon so solemn a Debate: For the Question before the Trustees was, whether the Land in Question did belong to the late Duke of York; and the Trustees upon Debate adjudged it to have belonged; ergo it vested in them; for I take it, that the Forfeitures and other Lands, &c. were at first vested in the Trustees only *sub modo*, or *de bene esse*, that is, until the same should be divested by subsequent Claims; so I say they were not absolutely vested at first, though I do agree, if the vesting Clause had come after the claiming Clause, it had been plainer: But it is the Office of the Judges to marshal Clauses in Acts of Parliament so that all may best stand together; for they are to register all the Lands vested, which they cannot do before they know what is vested; but they did register on a probable Cause, and they did well in so doing, for then they were to claim: But in this Case, as they would have it, it is the same Thing whether they claim or not; for if the Trustees give it against them on a Claim regularly heard, yet they may bring their *Ejectment*, and try it over again at Law, though the Judgment of the Trustees was to be final: And this is like the Notion some have of Predestination, whether they do well or ill their Fate is fixed and immutable. This Court of the Trustees was compared to Commissioners of Bankrupts, which differs from it, because this was a Court of Judicature; but if Commissioners of Bankrupts had Power to enquire and determine of the Estate of the Bankrupt, it would be the same; the Trustees had Power by this Act to reward Discoverers; and it seems by this



this special Verdict, they gave 100 l. to this Mr. Annesley; and how could they reward them before the Title was made out? This Defendant made out a Title, which the Trustees thought was good, and paid the Money of the Publick for the same; and now they come at Law, and say, this was no true Discovery; this surely would make this Part of the Act nugatory and idle: So that you must allow them a Power to determine what is vested, or else you make the Act idle. By the claiming Clause, any Persons having any Title, Estate or Interest, are to claim, and the Trustees are to determine, and their Determination is final. Mr. Dixon has claimed, the Trustees have determined it, yet now we have them at Law; this, I think, is against the Act, for the claiming, which is the saving Clause in this Act, is useless; because, though I do not claim, yet I may have my Remedy at Law. And here Mr. Dixon is safe for the Lands decreed for him, and there as to that he acquiesces, but as to the Lands decreed against him, he sues; so it is strange he should be loose, and the Publick bound. A Claim I take to be a Suggestion of an Exemption of a Forfeiture, the Determination of which is final; if that be so, then the Persons that determine the Claim have Power to determine what is vested, and what not; for a Power of hearing and determining carries in its Nature a Power of determining what is vested, or else this Power also will be nugatory. And this now will fall upon English Protestant Purchasers, who ventured their Money on the highest Security this Nation can give them, and who are not to have any Equivalent, nor have they any Warranty, Covenant, or any other collateral Remedy, so that they would be in a very mischievous Case, and they are those that would only suffer; whereas if the Construction I contend for be allowed, then no Body will suffer. And if the Trustees had an exorbitant Power, which was absolutely necessary in that Kingdom, to settle a Peace there; it seems they made very good Use thereof, for that there have been no Clamours nor Complaints against them; this Mr. Dixon being the only Person that I have heard, who thinks himself wronged by them. And for these Reasons, and because of the great Mischiefs that I foresee will happen, if the Estates of the Purchasers under this Act be suffered to be questioned, I think the Judgment given in B. R. in Ireland should be reversed.

Powell J. I think the Judgment in Ireland should be affirmed. And I take it, there is but one single Question in

in this Case, and that is, Whether the Trustees had a Power to determine what was vested in them; and for that I take it that no Land was vested in the Trustees, but what belonged to King James, or to forfeiting Persons: Now these Lands did not belong to King James, and I take it, that their determining that they did belong to him, will not make it so. My Brother Powis is right, in saying it was necessary to settle Ireland in Peace; but if this Construction would hold, it would be a Way to kindle a new War there, if all the Lands in that Kingdom were vested in seven Persons, and then to be de vested by their Claims, which I believe is what no Man in England or Ireland did suppose or imagine when this Act was made. I cannot tell where this Power is given to the Trustees, to determine what is vested. Mr. Solicitor tells us it is in one Place; Mr. Attorney in another Place; and both my Brother Powis's, I think, it is every where, in every Clause; and I confess I am so dull I cannot find it any where. But my Brother would have it vested *sub modo*; I cannot understand that: For if all the Lands that A. had, had been by Act of Parliament vested in B. now nothing is vested in B. but the Lands which A. had, which is our Case. But if an Act of Parliament will vest certain Lands, as Blackacre and Whiteacre, in certain Persons, there those Lands are vested in these Persons immediately, let the Property have been in whom it will, because every Body is a Party to an Act of Parliament, so no Wrong to any Person. But if only, as I said, the Lands of A. be to be vested, then no other Person's Lands shall be vested; and there is no Need of a Saving for any other Person; and there must be an Inquisition, or some Office, to find and ascertain what Lands A. had. Vide Plowd. 486. So is the Opinion of Hob. Hutton and Jones, 1 Jones 71, & 9. So if in this Case King James was in by Disseisin, yet the Right of the Disseissee was not vested in the Trustees; but the Disseissee might claim the Inheritance from them, because the Possession was vested in them; and so there was and might be a Case, where the Inheritance might be claimed as well as Incumbrances. But over an innocent Person's Estate they had no Jurisdiction at all, so what they did in such Case is *coram non judice*. It was much insisted upon, that the Crown was bound by the Judgment of the Trustees, and the Subject not; now I do think, that neither the Crown nor Subject was any Ways bound by any Judgment of the Trustees, but where they had Jurisdiction; and if the Crown

had any prior or other Right to these Lands the Trustees allowed to Mr. Dixon, I cannot think the Decree of the Trustees will in that Case be conclusive to the Queen; for all the Clauses in this Act of Parliament depend upon the vesting Clause. It was very fit they should have proper Means to find out what Lands did belong to King James, and therefore the Encouragement was given Discoverers, but if the Trustees were not well informed, and the Lands did not belong to the late King James, &c. it was at the Trustees Peril. I think the Verdict is very fair, for I have heard of no Fault that was found with it; and I hope the Affirmance of this Judgment will not be of such ill Consequence as my Brother apprehends.

Holt C. J. I think the Proceedings and Decree of the Trustees in this Case is void, and coram non iudice, and that the Lessor of the Plaintiff had a good Title to enter; and I do agree with my Brother Powell, that any other Construction of this Act of Parliament, would be, instead of quieting Ireland, the ready Way to have a new War there. It was intended the forfeited Lands, and those belonging to King James, should be vested in these Gentlemen, in order to be sold for the Publick, and instead of this we would vest all the Kingdom in them; this would be a mad Construction. I know none of the Trustees, they may be honest Gentlemen, for ought I know; yet it would be very unreasonable to give them such a Power; I believe the Parliament would not thank us, to give such a Construction to their Act. But it will be said, that the Act is executed, and no Hurt done, so this Fear needless; but I beg their Pardons, for if all the Lands in Ireland were vested in them, then such as have not claimed, are by this Construction in a very bad Condition, for they are concluded by the saving Clause. I take this Act, as it was made and intended, to have a very reasonable Construction and Interpretation. If King James had been a Disseisor, as my Brother Powell said, the Possession and defeasible Estate is vested in the Trustees; if a forfeiting Person had a Right of Action or Entry, this was vested in the Trustees; but the Possession in the Hands of an innocent Person was undisturbed by the Act: So if a forfeiting Person had a Condition, &c. if Tenant for Life was a forfeiting Person, this Estate was in the Trustees, but not the Reversions or Remainders, and he in Reversion or Remainder needed no Claim, for there is no Necessity to claim any Thing but what is vested. The Persons who are to claim



are those who had a Right to the Thing vested before the 13th of February 1688, as to the Lands of the late King James; so much for the Particulars of the Act, which, I take it, agrees with the whole. The Trustees had a sufficient Power over these Lands that were to be sold, and there was no Reason or Necessity to vest any more in them. I must confess, I know not what is meant by a vesting *de bene esse* or *sub modo*; but I think the Case put by my Brother Powell, where the Lands of A. are vested by Act of Parliament, is very good Law, and full to our present Purpose; so I take the Case of Terry and Huntington to be very full to this Case. Suppose a Formedon is brought in this Court, and the Demandant is barred, after he brings a Formedon in the C. B. and the Tenant pleads the Judgment in this Court against him, this is no Bar, for the Judgment here was *coram non iudice*; for the Admittance of the Parties does not give a Jurisdiction to a Court. So an Appeal for Murder in the C. B. and the Defendant is condemned, it is penal in the Sheriff to execute it; so in the Case of the Marshalsea, where their Jurisdiction was limited to Actions, and also was limited to Persons within the Uerge, &c. As to the Dischief to the Purchasers, I cannot think they are to be in a better Condition than those who buy Forfeitures every Day; though truly the Purchasers under the Trustees are in better Condition, for the Trustees had Power to lend for, keep or destroy all their Adversaries Deeds. This Case was very learnedly argued by my Brother Powis, Mr. Attorney and Mr. Solicitor; yet I must confess, I never conceived the least Doubt of the Case, and I am still very clear in it, that the Judgment should be affirmed.

# ISSUE GENERAL.

Hatton *versus* Morfe. 1 Ann.

Per Holt C. J. **I**N Debt, the Defendant may plead a Release; because it admits the Contract; and yet he might give it in Evidence upon Nil debet; so in Assumpsit he may plead Payment; and yet he may give it in Evidence on Non Assumpsit. So was the principal Case, and so ruled.

1 Salk. 394.  
Co. Lit. 282.  
b. 283. a.  
2 Roll. Abr.  
682. b.

# J U D G E S.

Groenvelt *versus* Burwell & al. Trin. 12 W. 3.

**I**N this Case it was said by Holt C. J. that no Judge is answerable, either to the King or the Party, for Mistakes or Errors of his Judgment, in any Matters whereof he hath Jurisdiction. It would expose the Justice of the Nation, and no Man would execute the Office, upon Peril of being arraigned by Action or Indictment for every Judgment he pronounces. If a Justice of Peace record that upon his Oath as a Force, which is not so, he cannot be drawn in Question for it. And in a Case where the Jury found and presented a Fact to be Trespass, the Judge of Oyer and Terminer caused their Finding to be entered as a Felony, and yet could not be punished by Indictment, or otherwise, because he was a Judge of Record, and the Indictment against him was to defeat his Record. The Matter affirmed by Sentence of a Judge is not traversable, where the Law intrusts him to try and determine it. But if a Constable commit a Man for a Breach of the Peace in his Presence, that may he traversed, for he is not a Judge, nor does he act by judicial Authority, though he has Power to commit for safe Custody.

(1.)  
1 Salk. 397,  
396.

9 Rep. 88.  
Plowd. 13.  
1 Roll. Abr.  
92.  
3 Keb. 322.  
Vaugh. 135.  
Cro. Car.  
395.  
Hardr. 478.  
195.  
Dyer 60, 69.  
2 Bulst. 64.  
March 8.

Wood *versus* The Mayor and Commonalty of  
London. March 2, 1701. In Error.

(2.)  
1 Salk. 397,  
398.

A T Guildhall, Debt was brought in the Court of the Mayor and Aldermen of London, for the Penalty of a By-Law made by the Common Council; the Penalty was 400 l. of which 300 l. was by the By-Law to be forfeited to the Use of the Mayor and Commonalty. Judgment was against the Defendant, and he brought Error before Commissioners appointed to examine those Errors, viz. Holt C. J. Ward C. Baron, &c. and it was held by Holt C. J. to which the rest agreed;

Moor 412.  
5 Co. 64. a.  
Mod. Cases,  
&c. 303.  
1 Lev. 15.  
2 Roll. Abr.  
92. a.

1st, That the Mayor, &c. might make a By-Law, and limit the Penalty to themselves, because there is no Way to enforce Obedience, but the Punishment, which must necessarily be either pecuniary, or corporal, as Imprisonment, which is not legal, unless there be a Custom to warrant it.

2dly, That it might be sued for in the Court of the Mayor and Aldermen, if the Mayor could be severed, and the Court held before the Aldermen. Thus the Chief Justice of the Common Pleas may bring an Action in C. B. but then there must be a special Entry, viz. Placita coram Johanne Blencow Milite, &c. omitting the Chief Justice; otherwise it would be erroneous. 8 H. 6. 81.

2 Cro. 234.  
2 Roll. Abr.  
355.  
Co. Lit. 112,  
187.  
Chan. Rep.  
21, 117.  
Dyer 304.  
Co. Lit. 264.  
a.

3dly, That if the Mayor was an Integral Part, so as there could not be a Court without him, it could not be sued for there, for he is Judge and Plaintiff, which cannot be.

4thly, Though the Mayor absents himself, and the Recorder sits for him, and that by the Custom of the City, yet it alters not the Case; for though the Recorder sits personally, yet it is legally the Act of the Mayor; the Recorder is his Deputy, and his Act is the Act of his Superior.

5thly, That the Case in 2 Ro. 93. title Judge, pl. 14. was Law, but not for the Reason there given; it did not there appear on the Face of the Record that the Plaintiff was Mayor, for it was brought by him as J. S. and he was not Mayor at the Commencement, but pending the Action became Mayor; and it could not be assigned for Error, because it was not pleaded below; and it was only Error in Fact, and could not be averred, nor appear to the Court above, without Averment.



Per Holt C. J. If the Judge who tried a Cause be since put out, upon Motion for a new Trial, he may certify the Court what his Opinion was when he tried the Cause. And where a Judge at a Trial erroneously over-rules a Matter offered in Evidence, the regular Way is to tender a Bill of Exception; yet if upon such a Matter, the Party will suffer the Trial to go against him, it is good Cause of a new Trial.

Term Trial.  
1 Ann.  
Farrell. 47.  
53.

See Courts.

J U D G M E N T S.

Banbury's Case. Hill. 6 W: 3.

Holt C. J. **I**F Action of Trespass is brought for a Trespass done in Lands belonging to such a House, though it appear at the Trial that the Plaintiff had no Title to the House, yet the Court cannot give Judgment to turn him out, because it was not judicially before them. And every Judgment must not only be compleat, but also formal; therefore if a Quo Warranto be brought against the Defendant for usurping Franchises, and the Court should give Judgment that he has no Title, unless they go on and say, quod abinde excludatur, it is ill. So in Debt upon a Bond, if the Defendant plead autrefois acquit in an Action on the same Bond, and the Judgment was that he the Defendant should recover Damages, & eat inde sine die, this is naught, without saying further quod querens nil capiat per billam; because Dismission is no Judgment in a Court of Law.

(1.)  
3 Salk. 213.

1 Vent. 27,  
59.  
2 Cro. 349.

And a Judgment shall have Relation to the first Day of the Term, as if it was given on that very Day, if there be not a Memorandum to the contrary, as where there is a Continuance of the Cause till another Day in the same Term.

3 Salk. 212.

Saunders *versus* ———. Trin. 7 W. 3.

(2.)  
Skin. 386.

**U**PON a Judgment, Goods were taken in Execution in the Possession of the Plaintiff, who had them by Virtue of a Sale from one G. on which the Plaintiff brought his Action; and the Defendant insisted, that the Sale was fraudulent against him, he being a Creditor by Judgment.

Holt C. J. held, that if the Judgment was upon a Point tried, then the Party need not to prove the Consideration, but it shall be intended good; but if it be a Judgment by Confession, &c. he ought to prove it to be for a just Debt, otherwise he shall not overthrow the Sale, though it be fraudulent.

Churchy *versus* Rosse. Mich. 7 W. 3.

(3.)  
5 Mod. 144.  
Vide 1 Salk.  
402.  
6 Mod. 85,  
163.  
1 Mod. 1.  
2 Lill. 47,  
434.

**I**F the Defendant is arrested, and in Execution, and one becomes bound for him to the Plaintiff, and the Defendant gives him Judgment for his Counter-Security, it is good, though no Attorney were present.

Rex *versus* Knightly. Pasch. 8 W. 3.

(4.)  
Com. 364.

**A**lexander Knightly Esq; was brought to the Bar to be tried upon an Indictment of High Treason, to which he had pleaded Not Guilty; and now, before the Jury were called, he confessed that he was unhappily surprized into the Design to assassinate the King, though at the same Time he did abominate the Thing itself, but when he was once engaged in it, he knew not how to retire without an Imputation of Cowardice. He desired the Chief Justice (as a privy Counsellor) to represent him to the Lords Justices as an Object of Mercy, &c. and he desired he might withdraw his Plea, and confess the High Treason; which was allowed.

And Holt C. J. said, It was resolved by all the Judges at Serjeants-Inn, in the Case of the Regicides, that it might be so done. So he pleaded Guilty, and was remanded to Newgate; for per Cur, he ought to have four juridical Days to move in Arrest of Judgment, if there be so many in

Term, or else as many as the Term will allow. (Judgment was once given immediately, but it was erroneous.)

*Rex versus Harris.* Trin. 9 W. 3.

Holt C. J. **S**IR Samuel Astry tells me, there never was (5.)  
a Writ to the Sheriff to take up any Man Coni. 447.  
that was at large, and to put him in the Pillory; therefore  
I think we cannot give any such Judgment (in the Absence  
of the Party) which cannot be executed. If he be in Court,  
we deliver him to the Marshal, and an Entry is on the  
Roll, that the Marshal do Execution periculo Incumbente.  
And if we were to send him into Somersetshire, there is to  
be a Writ of Assistance to the Sheriff; but if he came from  
Newgate hither, then if he be remanded, there goes indeed  
a Writ to the Sheriff, but then constat de persona.

Sir William Williams: Could this Man say any Thing  
if he were here, or should he be asked what he had to say?  
In my own Case, I was sent for indeed when the Court  
was to give Judgment against me; they did not ask me  
what I had to say, but fined me 10,000*l.* there was no  
Committitur indeed, (which was a special Favour, for which  
Complaint was made to the King,) and a private Capias ex  
officio was made out against me, though there was no Com-  
mittitur, and so there might be Judgment here.

Holt C. J. I never knew a Judgment for a corporal Pu-  
nishment, unless the Party were present, except the Case of  
one Mrs. Buckridge, which was irregular.

You may out-law him by next Term; for in Criminal  
Matters there is but one Capias before the Exigent.

*Duke's Case.* Mich. 9 W. 3.

**O**N Trial at Bar Duke had been convicted of Perjury, (6.)  
and upon the Capias he was afterwards outlawed for 1 Salk. 400,  
it; and it was then moved to give Judgment against him, 56.  
though absent. Skin. 684.

Holt C. J. Judgment cannot be given against any Man  
in his Absence, for a corporal Punishment; he must be pre-  
sent when it is done. If a Man be outlawed of Felony,  
Execution was never awarded against the Felon till brought  
to the Bar. There is no Precedent of any such Entry;  
for if we give Judgment that he shall be put in the Pillory,  
it



it might be demanded when, and the Answer would be, when they can catch him. And there never was a Writ to take a Man and put him in the Pillory; it is not like to a *Capias pro fine*, which is to bring him into Court to pay the Honey. A Defendant may submit to a Fine; though absent, if he has a Clerk in Court that will undertake for the Fine.

Anonymus. Mich. 10 W. 3.

(7.)  
1 Salk. 400.

**I**T was moved by Counsel to set aside an Execution on a Judgment, for that there was an Agreement between the Parties after the Judgment given, viz. That it should be upon Terms.

By Holt C. J. If a Judgment is confessed on Terms, it being in Effect but conditional, the Court will lay their Hands upon it, and see the Terms performed: But where a Judgment is acknowledged absolutely, and afterwards an Agreement made, this doth not affect the Judgment, and we will take no Notice of it, but put the Party to his Reason on the Agreement. The Court cannot hold Plea of an Agreement upon a Motion; and here it being only under their Hands, it is no Ground for *Audita Querela*.

Mich. 10  
W. 3.  
Cases W. 3.  
256.

Holt C. J. It is against the Trust reposed in the Court to let Judgment be entered of another Term than it is given; and it would be an intolerable Mischief to Men's Estates.

Duke of Norfolk's Case. Trin. 1 Ann.

(8.)  
Farrell. 39.

**A** Verdict was had in this Case in Easter Term, and before Judgment the Plaintiff died; and it was objected against the Entry of the Judgment.

Holt C. J. That shall not hinder the Judgment from being entered, provided, says the Statute 17 Car. 2. it be within two Terms after. And as to the Statute of Frauds and Perjuries, that only requires the Time of signing Judgments should be entered on the Roll; and that is only for the Benefit of Purchasers, for if the Judgment be signed in Vacation, yet it is entered as of the Term before; and none but a Purchaser shall be admitted to say, it was signed at any other Time.

2 Lev. 82.  
2 Show. 177.  
Cumberb.  
196, 292.

Oades *versus* Woodward. Mich. 1 Ann.

ONE Woodward had given a Warrant of Attorney to enter Judgment against him, as of Michaelmas or any other subsequent Term, and before the Judgment entered he died in Time of Vacation; and after the Attorney entered up Judgment, as of the Term when the Party was alive: And now it was insisted to be irregular, for that the Attorney's Warrant was revoked and determined by his Death.

(9.)  
Farrell 95.  
95.  
1 Salk. 87.  
Mod. Caf. 14.

Holt C. J. I agree that a Warrant of Attorney is generally revocable in its Nature: But by the Course of this Court a Warrant of Attorney to confess a Judgment may not be revoked, and the Court will give Leave to enter up the Judgment, although the Party does revoke it; and yet it is determinable by the Party's Death. Though if the Party dies in the Vacation, the Attorney may enter up the Judgment as of the precedent Term, and it is a Judgment at the Common Law of that Term; so that this being a Judgment at Common Law as of Hilary Term, it was a Judgment entered when the Party was living; and therefore good without all Question, if the Roll were brought in before the Essoin-Day of Easter Term; but that not being done, we cannot admit it to be filed as of another Term.

Gidden *versus* Drury. Hill. 1 Ann.

THE Defendant being under Arrest for Debt, to obtain his Liberty consented to give a Warrant of Attorney to confess Judgment to the Plaintiff; and there being no Attorney present, the Plaintiff discharged, as he said, the Bailiffs before the Warrant was executed.

(10.)  
Farrell. 139.  
115.

By Holt C. J. We will be well satisfied by Affidavits, that the Bailiffs were so discharged; and that if the Defendant had refused to execute the Warrant, they would not come again and seize on him; and we expect to have sufficient Reason so to believe, before we will let the Judgment stand. If a Man be arrested at the Suit of another, and, while he is under Confinement of the Bailiff, he gives a Warrant of Attorney to confess a Judgment, if there be no Attorney by, it is always taken to be by Duress: But when one has been in Gaol a good While, and then another who

1 Lill. 44.

is his Creditor comes to him, and he voluntarily without any Compulsion does confess Judgment to him, that Judgment shall stand, though there be no Attorney. And if a Man imprisoned in the King's Bench, confess a Judgment or Action to another, it shall be good; as if the Declaration were delivered to one in Custody of the Marshal, and he confesses the Action and gives Judgment.

Morgan *versus* Tomkins. Hill. 2 Ann.

(11.)  
6 Mod. 115.

**I**F there be an Outlawry upon an Indictment, and that is after set aside, the Judgment stands good, and open to proceed upon. But if Judgment be upon an Indictment by Nil dicit, or any other Judgment by the Court, and that be reserved, all is set at large, and there is an End of the Indictment. And it has been held in Keelyng's Time, that if a forcible Entry were traversed, yet there should not be a Restitution; in the Case of The King *versus* Carle. But the contrary has been held since, and before; and that there is no Way to prevent Restitution but by Certiorari, or pleading that the Party had Possession for three Years before. Vide Stat. 29 Eliz. per Cur<sup>3</sup>.

Herring *versus* Crocker. Trin. 3 Ann.

(12.)  
Mod. Caf.  
184.

4 & 5 W.  
& M.

**B**y the ancient Rules of the Court, the Judgments of one Term ought to be entered upon the Roll before the Effoin-Day of the next Term; and the late Act of Parliament for docketting Judgments, was only in Imitation of the ancient Course, and in Aid of it: And the Common Law is, that all Things done in the Vacation shall refer to the preceding Term, and be as if translated therein. Per Holt C. J.

Philips *versus* Berry. Trin. 6 Ann.

(13.)  
1 Saik. 403.

**Holt C. J.** **W**here Ejectment is brought in this Court, and upon a Special Verdict Judgment is given for the Defendant, if this Judgment is reversed in the Exchequer Chamber, that Court shall give Judgment and enter it; but had it been upon Demurrer, this Court should have entered the new Judgment, because the Exchequer



chequer Chamber could not have awarded a Writ of Inquiry of Damages. And he said further, if Judgment be first given for the Plaintiff, and that is reversed in Error, the Defendant is in Statu quo thereby, and no new Judgment need be given: But if the first Judgment was for the Defendant, and that is reversed, a new Judgment must be given to put the Plaintiff in Possession of what he demands. And the Court, having given Judgment on the Original in this Case, have executed their whole Authority; and there is no Precedent, that this Court ever entered a new Judgment, where the Judgment given here was reversed in Parliament; but the Lords must enter it.

2 Saund.  
255.  
1 Lev. 310.  
1 Vent. 28.  
Cro. Car.  
509, 442.  
1 Roll. Abr.  
805.  
2 Danv. 59.  
2 Inst. 23.

## JURISDICTION.

Hill. 8 W. 3.

Holt C. J. **I**F a Record comes here out of the Marshalsea, you cannot have Execution larger than the Marshalsea; but if by Writ of Error, you may have Execution on the Affirmance of the Judgment all over England.  
See Courts.

Cases W. 3.  
116.

## J U R O R S.

The King *versus* Perkins. Anno 1698.

**A**T the Sittings at Westminster, in a Cause tried before Holt C. J. he said, that it was the Opinion of all the Judges of England, upon Debate between them, that in all Capital Cases, a Juror cannot be withdrawn, though the Parties consent to it: That in Criminal Cases, not Capital, a Juror may be withdrawn, if both Parties consent, but not otherwise; and that in Civil Causes, a Juror cannot be withdrawn, but by Consent of all Parties.

(1.)  
Carthew  
465.

Term Pasch.

1 Ann.

Farrell. 1, 2.

By Holt C. J. & Cur': If Jurors in an inferior Court will not agree of their Verdict, the Way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, 'till they all agree; and the Steward may adjourn the Court until they agree. In Case a Jury give a Verdict upon their own Knowledge, they ought to tell the Court so, but the fairest Way would be, for such of the Jurors as had Knowledge of the Matter, before they are sworn, to inform the Court of the Thing, and be sworn as Witnesses.

Gree *versus* Sharp. Mich. 3 Ann.

(2.)  
6 Mod. 265.

1 Keb. 179,  
418.

3 Keb. 103,  
254, 485.

2 Salk. 665,  
545.

Ejectment, upon Demise at such a Place in Devonshire, of Lands in another Vill in the same County, and the Ven. fac. was from the Place of the Demise, and at Cause's being carried down, and a View granted, there being a Jury and a Decem Tales, at the Trial a Panel was returned promiscuously of the Jury and Decem Tales; and for this Irregularity a new Trial was granted.

And per Cur': In Ejectment, the Venue ought to come always from the Place where the Lands lie, and not from the Place where the Demise is laid to be made; but that Fault is cured after Verdict, by the Statute of Oxford.

And per Holt C. J. There is a Difference between the Practice of the Common Pleas and this Court in Case of Views granted. If upon a full Jury in the Common Pleas the View be granted, and a Juror withdrawn, an Entry is made of this, and Process continued against the Jury, and a Decem Tales awarded on the Roll, and there may be a Command of a Tales de circumstantibus besides; but in the King's Bench, if a full Jury appear, and a View is granted, and a Juror be withdrawn, they take no Notice of it by Entry, but only grant a new Distringas against the same Jury, except the Juror withdrawn. But if there be a Decem Tales awarded here, and a Jury appears, and a View is granted, there they must take Notice of it by Entry, and continue Process against the Jury and Decem Tales, otherwise the Decem Tales would be discharged; and the Distringas of the Decem Tales must be the same Decem tales returned upon the first Writ; and to mix the Persons returned on the principal Panel and the Decem Tales in the Panel that tries the Cause, after the View, is irregular; therefore the Verdict was set aside.

## Justices of Peace.

The King *versus* Alsop. Mich. 3 W. & M.

**T**HE Defendant was convicted before the Justices of Peace in Sessions, on an Indictment brought against him for shooting in a Gun with Pail-Shot, contrary to the Statute 2 & 3 Ed. 6. and upon that Conviction was committed 'till he paid the Forfeiture of 10 l. and afterwards he brought a Habeas Corpus, whereupon being in Court, several Exceptions were taken to the Indictment, and particularly, that the Justices of Peace have no Jurisdiction to hear and determine this Offence.

Holt C. J. The Justices of Peace, by the general Words of their Commission, have Power to punish Offences against any Statute made concerning the Peace of the Kingdom; but by this Act on which this Indictment is brought, the Peace is in no wise concerned, because the Offence thereby created is for want of due Qualification of the Person to shoot, which is not against the Peace. And it cannot be an Indictment upon the Statute of H. 8. because they do not shew the Length of the Gun, which by that Law ought to be a Yard long; and therefore the Conclusion contra formam Statut' will not help it. But it was agreed, that the Party might be indicted for this Offence before the Justices of Oyer and Terminer; but not before Justices of Peace, for want of Jurisdiction.

The Indictment was quashed.

The King *versus* Randall. Mich. 7 W. 3.

**I**T was here moved to quash two Orders of Justices of Peace, one made by two Justices, relating to licensing the Defendant to sell Ale, and the other by the Justices in Sessions for suppressing him, &c. And it was said, that the Quarter-Sessions cannot controul the Authority of two Justices in this Matter.

Holt C. J. A Difference hath been taken in these Cases: That were an Authority is given to two Justices of Peace to do a Thing, and from which there lies no Appeal, there



1 Saund. 249.  
2 Keb. 506.

it may be commenced and done in the Sessions; but if an Appeal is given, then the Sessions not having an original Jurisdiction, it must not be begun there. But here the Question is, Whether the Sessions can suppress an Alehouse licensed by two Justices? and adjudged they could not, except it is for Disorders committed.

And the Order was thereupon quashed.

Farrell. 99.

Holt C. J. declared, If Complaint were made to him, that a Justice of the Peace had issued his Warrant to take away Goods out of a Man's Possession, to which he pretended a Right, he would send for the Justice, and bind him over; for People must take the legal Remedy, that is Detinue, Trover or Replevin.

### Elizabeth Claxton's Case. Mich. 13 W. 3.

(3.)  
Cases W. 3.  
566.

SHE was committed to New-Prison by Justice P——, there to remain till she found Security for her good Behaviour, for being taken in a disorderly House; and being brought up by Habeas Corpus, her Counsel moved for her Discharge; 1st, Because being taken in a disorderly House was no Reason to require Sureties of the good Behaviour, for that any honest Person might accidentally be there, and know nothing of its being such a Place; quod fuit concessum. 2dly, That in Case it were Cause, yet the Commitment is to an illegal Gaol, viz. New-Prison. 3dly, That in Case a Woman's being taken in a disorderly House be a Reason to take her for a lewd Woman, and so within the Jurisdiction of a Justice of Peace, yet the Way was to send her to the House of Correction, but not to require Sureties of the good Behaviour.

Holt C. J. It is not true to say, that every one that has not a visible Way of Living shall be liable to find Sureties of the good Behaviour. Indeed, if one lives extravagantly and high, who has no visible Way of getting, it may be reasonable to enquire how he lives; but if a Man lives in a reasonable quiet Manner, it is hard to hold him to it. But lewd and disorderly Persons may be held to their good Behaviour, or committed to Gaol, or they may be sent to the House of Correction. But what is it makes a lewd Person? It is not being caught in an House of Bawdry, or a disorderly House at a seasonable Time. And though a Justice of Peace may be a Judge of who is a lewd and disorderly

derly Person, and therefore if the Commitment had said, that it had appeared to him that this Person was such, we would have taken his Word for it; yet when he assigns the Reason of his Judgment, and we find that Reason will not maintain it, we are not to regard his Judgment; and as Persons of ill Behaviour are to be punished, so great Care is to be taken of the Innocent. She being remanded, and brought up at another Day, several Affidavits were read of her Lechfulness, whereupon the Court quashed the Justice's Commitment, and ordered a Rule to be drawn for her Commitment to the Marshal thus: Because it appears to us, that she is a lewd Woman and a frequenter of Bawdy-Houses, ideo she is committed 'till she find Sureties of good Behaviour.

And Holt C. J. quoted 13 H. 7. 10. That a Constable may commit lewd Women 'till they find Sureties, and Neighbours are bound to assist.

*Caly versus Hardy, Golson, & al', Just. Pacis of the Town of Ipswich. Pasch. 3 Ann.*

**T**HE Magistrates of the Town had a Mind to turn the Clerk of the Market out of his Place, and procured a forcible Entry to be made upon the Market-house, to get the Possession thereof from him, and the Justices of the Town being, as was suggested, in the Faction, would not enquire of the Force.

Holt C. J. If all the Justices of a Corporation are concerned in a Force, and will not enquire of it, the next Justices of the County shall do it; for the Denying to do it is a Forfeiture of their Exemption from the County. And here a Mandamus was granted jointly and severally to all the Justices of the Town, to enquire of the Force; for the Court would suppose them all guilty.

(4.)  
6 Mod. 164.  
1 Salk. 327.

## JUSTIFICATION.

Matthews *versus* Carey. Mich. 1 W. & M.(1.)  
Carthew  
73, 74.

**I**N Trespals, for taking the Plaintiff's silver Tankard, as a Distress for an Amerciament, made on Presentment of an Offence committed, and detaining it till the Plaintiff should pay 5 l. The Defendant justified, that as Bailiff of the Liberty, &c. per Mandatum of the Dean and Chapter of Westminster, he distrained the Tankard, but did not set forth any Authority by Virtue of any Precept or Warrant, &c.

Moor 573.  
Cro. Eliz.  
698.  
26 H. 8. 8.  
Skinn. 587.

Holt C. J. In Justification for a Trespals, as in this Case, 'tis absolutely necessary for the Defendant to set forth a Warrant or Precept, &c. but not for him to aver the Matter of the Presentment, because his Plea is only in Excuse: But in Abowry for an Amerciament in a Court-Leet, he ought to aver in fact, that the Plaintiff committed the Crime for which he was amerced, without shewing any Authority to distrain, because he is an Assor; and a Replevin is an Action grounded on the Right; therefore in such Action the Command is not traversable. Here the Justification is ill, because the Defendant hath not set forth any Warrant from the Steward of the Court, for his Authority to distrain; and the Allegation that he distrained per Mandatum of the Dean and Chapter, &c. is frivolous, for a Bailiff cannot distrain by that Means: He may not do it ex officio, no more than a Sheriff may execute a Judgment without a Writ; and the Command here is traversable.

The Plaintiff had Judgment.

Freeman *versus* Blewitt. Hill. 12 W. 3.(2.)  
1 Salk. 409,  
&c.

**T**RESPALS for taking the Plaintiff's Goods; the Defendant pleaded, that a Pleint in Replevin was entered in the Sheriff's Court in London, that the Defendant was Serjeant at Mace, and a Precept came to him to replevy these Goods, which he did accordingly. Upon Demurrer it was objected, that the Defendant was principal Officer, and his Precept was returnable, and yet he does not shew it was returned.



Ruled by Holt C. J. to which the rest agreed, that where-  
 ever a principal Officer is to justify under a returnable Pro-  
 cess, he must shew that the Writ was returned; but other-  
 wise of a subordinate Officer, as a Bailiff. Vide 20 H. 7. 13. Lane 52.  
 21 H. 7. 22. 3 Lev. 204. 5 Co. 90. a. Br. Trespals 48, 70. Moor 57.  
 104, 154. Fitz. Trespals 198. Now a Replevin, or an alias Owen 48.  
 Replevin, are not returnable Process, therefore there is no Latch 223.  
 Return to be made to the first or second Writ; but the plu- 4 Co. 67. a.  
 ries Replevin is always with this Clause vel causam nobis Cro. El. 17.  
 signifies; and therefore it is a returnable Process. And if pl. 8.  
 any principal Officer justify under it, he must shew it was  
 returned; otherwise of a subordinate Officer. In the Case Cro. Car.  
 at Bar, the Defendant is a principal Officer, and this Pro- 447.  
 cess, under which he justifies, was a returnable Process.  
 Judgment for the Plaintiff.

Chance *versus* Weedon. Mich. 13 W. 3.

In this Case Holt C. J. held, that where the Defendant (3.)  
 justifies by Virtue of an Authority by the Common Law, 2 Salk. 628.  
 as a Constable on Arrest for breaking of the Peace, &c. De 1 Lev. 307.  
 injuria sua propria is a good Replication thereto; so it is, 2 Lev. 11.  
 and by the same Reason, when one makes Justification by 3 Lev. 41.  
 Authority of an Act of Parliament; for being a general Law,  
 the Statute can be no Part of the Issue.

A Defendant may justify an Assault in Defence of his Per- 3 Salk. 46,  
 son, or of his Wife, because they are but as one Person; 47.  
 so he may in Defence of his Master, as Protection and Al-  
 legiance is due to him. And a Master can justify the Beat-  
 ing his Apprentice, Servant, Scholar, &c. in Nature of  
 Correction only, and with a proper Instrument; for if it be  
 otherwise, Immoderate castigavit is a good Reply: And in  
 an Action against the Master in such Case, he ought to  
 shew some Cause specially, or the Fault for which he beat  
 his Apprentice; or on Demurrer, his Plea in Justification  
 will be adjudged ill. Per Holt C. J.

## L E A S E S.

Cudlip *versus* Rundli. Entr. Trin. 2 W. & M.  
Rot. 646.

(1.)  
1 Show. 310.

**C**ASE, narr. pro eo quod the Plaintiff 25 Martii, 36 Car. 2. was possess'd of an House with the Appurtenances for a Term of Years, then and yet to come; and being so possess'd did by Indenture demise the Premises to the Defendant for seven Years then next ensuing; by Virtue whereof the Defendant entered, and was thereof possess'd; and so being possess'd, and the Plaintiff possess'd of the Reversion thereof, the Defendant afterwards, the 8 November an. &c. ignem suum in domo præd. tam negligenter Custodivit, that the House was burnt, to his Damage of 300 l.

Defendant pleads Non dimisit modo & forma prout querens narr. Issue thereupon.

The Jury find, that the Plaintiff 25 Martii was possess'd of the Premises for a certain Term of Years, then and yet to come; and being so possessed, by Indenture then made, in Consideration of the Rent and Covenants therein after mentioned, he did demise, grant, and to farm let, for Herbage, Pasture and Tillage, to the said Defendant, his Executors and Assigns, all that one Messuage or Tenement, with the Appurtenances, commonly known by the Name of Ugbeare, situate in Tavistock, and then in the Tenure of the said Cudlip, or Assigns, together with all Houses, Out-houses, Structures, Profits and Commodities thereunto belonging, or in any wise appertaining, excepting, and always reserving out of the said Demise and Lease, to the Plaintiff, his Executors and Administrators, the House commonly called the New House, new built upon the Premises, for the Use only of the Father of the said Plaintiff and himself, and their Wives and Family to live in, if they please, but not to be let to any Person or Persons whatsoever; and at all other Times when they shall not dwell there, to be used by the Defendant, his Executors and Assigns; and also except one Nursery, with the Trees therein growing, to the Plaintiff, his Executors and Assigns, during the Term after mentioned; To hold the

the Premises (except before excepted) to the Defendant, his Executors and Assigns for seven Years, &c. That at the Time of the Lease made, there were two Houses upon the Premises, one old one, and one new built; that the new built House only was burnt; that at the Time of the Fire, the Defendant was in Possession of the new built House (except one Room which the Plaintiff had) and that the new built House was burnt by Fire made, and negligently kept by the Defendant in that Part of the House then in his Possession; Et si, &c. ad dampn' ad 100l. & si pro defend'.

Holt C. J. I think this new House absolutely excepted out of the Demise. The Words are as full an Exception as can be. The Words afterwards are no manner of Qualification of the Words of the Exception, but only declarative of what Purposes 'twas for. An Exception may be qualified, as it may be for Part of the Term; but if a Lease or Assignment be for Years, with an Exception of the new House for Life, this Exception is void. 1 And. 52. is our Case in Point, and good Law, and there held a good Exception, and qualified; in Dyer 'twas held a void Exception, but for another Reason, because repugnant. Now 'tis true, you cannot except that which was particularly and expressly granted, but then the Grant is only in General; the Case of Pitt and Marshall, Dyer 264. in the Margin, I take to be good Law. Judic. pro Def. by the whole Court.

*Parker and Harris.* Hill. 3 W. & M.

**I**N Debt for Rent upon a Demise, the Plaintiff declared that he, the 25th Day of March, &c. demised unum Messuagium super acclivitatem Hamstead-Hill, Habend. for Years; and declared upon another Demise 1 May, &c. of another Parcel of Land, habend. at Will, reddend' secundum ratam of 18l. per Annum, and for Rent arrear, &c. The Defendant pleaded, that the Plaintiff tempore dimission. particularium nihil habuit in tenementis; the Plaintiff replied, that the Lord Wootton was seised, and demised to him for forty-one Years, and he being so seised, the said first Day of May, demised to the Defendant, &c. upon which the Defendant demurred; and adjudged in Communi Banco for the Plaintiff; upon which a Writ of Error was brought.

( 2. )  
Skins. 327.

First,



First, Because *super acclivitatem* Hamstead-Hill is uncertain in what Place it is; for it is not a Vill, or Lieu Conus, but an Accident, and no more than if he had said upon the Fertility of Hamstead-Hill; non allocatur; the Venue shall be from Hamstead-Hill, which may be a Vill, or Lieu Conus; also if it had not been such Vill, Hamlet, or Lieu Conus, the Defendant ought to have pleaded it in Abatement. The Demise is alledged to be made the 25th of March, habendum a die datus, and the Action is brought for Rent due ad festum Michaelis, where it is not due till the last instant; and if the Lessee be ejected upon the Day, the Rent is not due; non allocatur; for ad festum Michaelis, the Tenant being then in Possession, he shall not be intended to be ejected; and if he was, he ought to have pleaded Eviction.

To the Replication it was excepted, Because he pleads that the Lord Wootton demised to him, without shewing any Title; sed non allocatur; for by Holt C. J. he having shewn that he was possessed by Virtue of a Lease from the Lord Wootton, it is well enough; and more than needs; for, if he was only Tenant at Will, and demised for Years, and the Defendant pleads as here, the Plaintiff might reply, that he was seised in Fee, and demised; and tho' it be found that he was not seised in Fee, yet it being found quod aliquid habuit in tenementis, it is found for the Plaintiff.

Holt C. J. seemed to think that the Reservation was ill.

Netherton and Jessop. Mich. 6 W. & M.

(3.)  
Skins. 569.

IN Debt, the Plaintiff declared, that per quoddam scriptum, &c. being a Deed-Poll, testatum est quod the Defendant cepisset of the Plaintiff such Lands, pro uno anno si vita tam diu viveret ad vigint' & quinque Libras solvend' ad duo festa maxime usualia, &c. and Counts also upon a Lease Parol (Si J. M. tam diu viveret) for one Year, &c. and avers, that J. M. was the Life intended, and that he was living at the Time that the Money was due, &c. and Issue taken, that J. M. was not living, and a Verdict for the Plaintiff; and it was moved in Arrest of Judgment; first, because no Demise alledged; for it is only a Deed sealed by the Defendant, which says that he cepisset; but not said, that the Plaintiff had demised, also no Term certain is shewn, for which it was demised; for Si vita tam diu

*diu viveret* is wholly uncertain for what Life it shall be; and such Averment dehors is not allowable: Also the Count is by a Testatum existit, which is not good in this Case, tho' it be good in Covenant.

Holt C. J. seemed to admit, that there might be an Averment, if he counted he was seised for the Life of J. S. and leased it to one for a Year, If the Life in the Tenements so long shall live, and then aver, that J. S. was the Life in the Tenements; but *vita* in the Principal Case is wholly uncertain; then it was said, that Debt lies upon a Covenant to pay Money at a Time certain, and here the Defendant is bound to pay to the Plaintiff so much Money. He has counted upon the Deed, as the Deed is, it is good as a Debt upon a Covenant, tho' not upon the Demise.

But to this Holt C. J. said, a Man may not Count in the Words of the Deed, but as the Deed is by Operation of Law; as if the Tenant for Life by the Word *Dedi* grant his Estate to him in Reversion; this ought to be pleaded as a Surrender, as it is by Operation of Law, and not in the Words of the Deed. So here also, he said that they have counted for this as Rent, and it is a Rent in its Nature, and therefore may not be demanded by Action of Debt upon a Covenant, as for a Sum in gross. It was said this was a Lease for one Year certain by the Covenants, tho' it be not upon the Demise.

To this Holt C. J. said, That upon the Covenants in Law no Action lay, if the Term is determined by the Death of *Cestuy que vie*, for they being annexed to the Estate determine with the Estate; but if there were any express Covenants, it is otherwise, according to the Difference in Dyer, and was strongly against the Averment to the Objection, that the Issue was immaterial; it was answered that the Verdict being found for the Plaintiff, and he having a good Declaration, he shall have Judgment.

But per Holt C. J. The Issue here is quite throughout immaterial, and there ought to be a Repleader; and it seemed to him that the Words in this Case, *si vita tam diu viveret*, were odd and insensible, and that he might have declared upon a Demise for a Year certain.

Stomfil *versus* Hicks. Mich. 9 W. 3.

(4.)  
2 Salk. 413.

1 Sid. 359.  
1 Mod. 4.  
1 Lutw. 213,  
214.  
Aley 4.  
Cro. El. 775.

**A.** Possessed of a Term for 100 Years, grants the Land, Habendum for forty Years, to commence after his Death; this is a good new Lease; and if H. possessed of a Term for twenty Years, grant the Tenements for nineteen Years, to commence after his Death; this will be good for so much of the twenty Years as shall be unexpired at the Time of his Death. Ruled by Holt C. J. at Lent Assizes at Dorchester, 10 W. 3. Gree *versus* Studley.

If A. demise Lands to B. for a Year, and so from Year to Year; this is not a Lease for two Years, and afterwards at Will; but it is a Lease for every particular Year; and after the Year is begun, the Defendant cannot determine the Lease before the Year is ended. The Lessor cannot determine his Will in the Middle of a Quarter, without permitting the Tenant to have the Emblements. Ruled by Holt C. J. at Summer Assizes at Lincoln 1699.

Winter *versus* Loveday. Mich. 9 W. 3.

(5.)  
5 Mod. 245,  
378, 381, 382.

**I**N Trespass and Ejectment a Special Verdict was found by the Jury; the Substance of which was, that G. P. being seised in Fee of the Manor of M. whereof the Lands in Question, and of which a Lease was made, were Parcel and Copyhold; upon the Marriage of his eldest Son, he made a Settlement of the Manor and Lands, &c. to divers Uses, with Proviso that it should be lawful for the said G. P. during his Life, to make Leases in Possession for one, two or three Lives, or for thirty Years, to commence after such Lives; or for any other Term determinable on one, two or three Lives, or in Reversion, &c. So as such Leases be not made of the antient Demesne Lands, Parcel of the said Manor, or any other Lands used therewith, and so that the antient Rent be reserved.

Holt C. J. The general Question is, whether the Lease made of Copyhold Lands for thirty Years, be a good Lease by Virtue of this Power? And I am of Opinion, that this is not a good Lease. To clear this Point two particular Questions arise, first if the Term granted be within the Power? To which I answer, that it is within it, and this depends on the Penning of the Words there-

of:



of: Now in a large Sense, any Lease made to commence at a Day to come, may be called a Lease in Reversion; but that is not meant in this Case, for the Lease here is rather to be taken in the common Sense, from and after a present Interest then in Being, and the Proviso extends not only to a Lease for Years in Reversion, but also to a Lease for Life in Reversion; and if it be for Life, it is a concurrent Interest. I take it, as this Power is worded, he may make a Lease for thirty Years in Reversion absolute; because the Clauses are distinct to make a Lease for that Term, or else for any other Term of Years determinable upon one, two, or three Lives: But whether this Coppelhold Lease was in Being at that Time is uncertain; and if a Man hath Power to make a Lease in Possession or Reversion, he cannot do both. Then as to the second Question which arises, whether the Power does extend to make Leases of the Coppelholds? I do think that this Power extends not to a Coppelhold Estate, for that would be to destroy the Manor, which could never be intended: And all the Demesne Lands are expressly excepted out of this Power, and the Coppelholds are Part of the Demesnes; and therefore the Coppelhold Lands are within the Exception. It is plain that every Manor must consist of Demesnes and Services, and those are sufficient to support the Being of a Manor; for if the Lord of a Manor aliens his Mansion-house which he had in Possession; yet if the Coppelholds and Services remain, it is still a good Manor; and then there was no Occasion that this Power should extend to Coppelholds: Indeed here, if the Exception had separated the Demesnes from the Rents and Services, it would be hard to make such a Construction; but these Lands being Part of the Demesnes, the Lease is not good within the Power.

Judgment was given for the Plaintiff.

Layton *versus* Field. Hill. 13 W. 3.

By Holt C. J. **I**f a Lease be made at Will, after a Quarter of a Year is commenced the Lessee may determine it, but then he is obliged to pay that Quarter's Rent; and in Case the Lessor determines his Will after the Commencement of a Quarter, he shall lose the Rent for that Quarter: But where a Lease is made from Year to Year, so long as both Parties please, there after a Year

6 Rep. 39.  
Yelv. 222.  
Cro. Jac. 318.  
Cro. Eliz. 5.  
3 Bulst. 14.  
1 Roll. Rep. 142.  
2 Roll. 186.  
Lutw. 269.

( 6. )  
3 Salk. 222.  
2 Salk. 415.

a Year is commenced, neither the Lessor nor Lessee can determine their Wills for that Year; they having for so long Time certainly willed the Estate.

Dod *versus* Monger. Trin. 3 Ann.

(7.)  
Mod. Cases  
215, 216.

**T**HE Plaintiff was seised in Fee of a certain Messuage, &c. and leased it to the Defendant for a Year, and so from Year to Year, as long as both Parties should please, by a Parol Demise, reserving Rent: And for Rent arrears he distrained, and the Distress was rescued from him by the Defendant; for which Action was brought, &c.

Holt C. J. In Case a Lease be for a Year, and so from Year to Year, as long as both Parties shall please, that is a Lease binding but for one Year; but if the Lessee, without Countermand of the Lessor, enter upon the second Year, he is bound for that Year, and so on: And if the Lease be for a Year, and so from Year to Year till six Years expire, that is a certain Lease for six Years: Also if it be made for a Year, and so from Year to Year, as long as both Parties agree, till six Years shall expire, that is a Lease for six Years determinable at every Year's End at the Will of either Party. And he likewise held, that if a Lessor or Landlord come into the House demised, and seizes upon some Goods as a Distress for Rent, in the Name of all the Goods in the House, that will be a good Seizure of all: But he must remove them in convenient Time at Common Law, and now since the Statute of W. & M. immediately, except it be Hay or Corn; and here the Distress was not removed in two Days, so that the Plaintiff had not the Possession of the Goods, at the Time of taking them away, without which there could be no Rescous: The Plaintiff was nonsuited.

In this Case it appeared also, that the Landlord who distrain'd drew Beer out of one of the Barrels seised in Distress, which made him a Trespasser ab initio as to that Barrel: Per Holt C. J.

Co. Lit. 47.  
1 Roll. Abr.  
675.  
Cro. Eliz.  
720.  
2 W. & M.  
c. 5.

Crockerell *versus* Owerell. Mich. 5 Ann.

**T**RESPASS; the Case was, that A. being seised in Fee of the Lands in Question, did thereof make a Lease to the Plaintiff for Years, habendum de anno in annum quamdiu ambabus partibus placuerit, to begin the 25th of March, paying yearly for the same 20 l. yearly, by equal Portions, at Michaelmas and Lady-day; the Rent was behind at Michaelmas, and A. died in January following, having made the Plaintiff, his Wife, his Executrix, and she distrained for the 10 l. Rent due at Michaelmas to the Testator, the Cattle of the Defendant the 17th of April following, & li, &c. upon this Special Verdict, Whether it was for two Years certain, or not, as 3 Cro. 775. which they agreed to be good Law, or not, the Court did not determine; but they agreed, that if the Parties in such a Lease do begin the Year, the Will cannot be determined till the End of the Year, All. 3. Cro. 775. & Q. Br. Lease 53. and this Case, tho' A. died in January, and the Death of one of the Parties determines the Will; yet here the Defendant was to hold the Land till the 25th of March, and the Half Year's Rent at Michaelmas belonged to the Plaintiff, as Executrix; and the Half Year's Rent, which became due the 25th Day of March following, did belong to the Heir, with the Reversion; but in this Case the Plaintiff had Judgment; for tho' the Defendant had a Right to the Rent due at Michaelmas, yet she could not distrain for it after the 25th of March, because the former Lease at Will made by the Testator was then determined.

(8.)  
In what Cases, and at what Times Tenants at Will may determine their Estates.

See 2 Salk. tit. Leases.

Legg *versus* Strudwick. Hill. 7 Ann.

**I**N Replevin, the Defendant avowed, for that he being seised in Fee of the Locus in quo, demised the same to A. Habendum de anno in annum, & sic ultra quamdiu ambabus partibus placeret, to commence from Lady-day 1703. rendering an annual Rent, payable quarterly. The Lessee entered, and died the 17th of December, 1706. And the Rent for a Year and a Half, ending at Christmas before, was arrear; for which the Lessor entered, and distrained; to this the Plaintiff demurred. Per Cur', It was held, first, That after the two Years, the Lessor or Lessee might determine;

(9.)  
2 Salk. 414.



1 Salk. 413.  
1 Mod. 4.  
1 Lutw. 213,  
214.

but if the Lessee held on, he was not then Tenant at Will, but for a Year certain; for his holding on must be taken to be an Agreement to the original Contract, and in Execution of it. 2dly, The third Year is not in the Nature of a distinct Interest; therefore the Lessor may distrain the third Year for the Rent of the Second; and such executory Contract is not void by the Statute of Frauds, because there is no Term for above two Years subsisting at the same Time, and there can be no Fraud to a Purchaser; for the utmost Interest that can be to bind him can be only one Year.

## LECTURERS.

Church-wardens of St. Bartholomew's *Cafe*.  
Mich. 12 W. 3.

3 Salk. 87.

**A** Man left so much per Annum for the Maintenance of a weekly Lecturer, and appointed that he should be chosen by the Parishioners, and to preach on any Day in every Week as they should think fit: The Parishioners fixed on Thursday, and chose a Lecturer every Year; and now a certain Person being Lecturer, and the Parish having chosen another, he would not submit to the Choice; whereupon the Church-wardens shut him out of the Church; afterwards the Bishop of L. determined in his Favour, and granted an Inhibition.

Holt C. J. A Prohibition must be granted to try the Right; 'tis true, one cannot be a Lecturer without Licence from the Bishop or Archbishop; but their Power is only as to the Qualification and Fitness of the Person, and not as to the Right of the Lectureship: And the Ecclesiastical Court may punish the Church-wardens, if they will not open the Church to the Person lawfully appointed, or to any one acting under him; but not if they refuse to open it to any other.

# L E G A C Y.

Ewer *versus* Jones. Mich. 2 Ann.

Holt C. J.

**A** Devisee may maintain an Action at <sup>2 Salk. 215.</sup> Common Law against a Tenant for a Legacy devised out of Land; for where a Statute gives a Right, the Party by Consequence shall have an Action at Law to recover it. See 2 Show. 36, 37. 1 Chan. Cases 57, 257, 258. 1 Chan. Rep. 134, 218. and prox. pag. Mod. Cases 20.

## Letters Patent.

The King *and* Kemp. Trin. 6 W. & M.

**A** Scire facias was brought to reverse a Patent; the <sup>(1.)</sup> Case was, King Charles the Second grants the <sup>Skinn. 446.</sup> Office of Searcher to Martin, durante beneplacito: And after, reciting the said Grant to Martin, grants the said Office to Eyre, habend. after the Death, Surrender, or Forfeiture of the Patent to Mr. Fryer for his Life; and after, in the 26th Year of his Reign, by another Patent, reciting the two former Patents, to Martin and Fryer, he grants the Office to William Kemp for Life, habend. after the Determination of the Patent to Martin and Fryer by Death, &c. and further in the same Patent grants it to Henry Kemp, ut supra: Martin, Fryer, and William Kemp are dead; and a Scire facias is brought to repeal the Patent to Henry; and in Trin. 7 W. 3. Judgment was given by Eyres J. and Holt C. J. they only being in Court; G. Eyres being dead, and Justice Gregory absent; and Holt C. J. said, The Grant in Question depends upon the Validity of the Grant to Fryer: For, if this be not good, then the subsequent Grants are not good: For then the King would be deceived in his Grant; for his Intent

Intent was only to grant an Office upon the Determination of a prior Grant; and not to grant an Office immediate: As to what has been objected, that the Grant to Fryer is void, it being to commence upon the Forfeiture or Surrender of M. which is an impossible Beginning, for M. having but an Estate at Will, he could not surrender it, for an Estate at Will cannot be surrendered. But when one Party agrees to depart with his Estate; and the other to accept it; this amounts to a Determination of their Wills, but not to a Surrender.

Per Holt C. J. In the Case of the King it is otherwise, and he who has an Office at the Will of the King, has it not at the Will of both Parties; as between common Persons, but the Will is the Will of the King; and the Subject cannot determine his Will without the Permission of the King; therefore Tenant at Will of the King may surrender, and there ought to be a Will of the King declared under the Great Seal, that he accepts his Surrender; otherwise he is fineable, if he surceases to execute his Office without such Discharge; and it was so done in the Case of Hide and Hale Chief Justices of the King's Bench, who actually surrendered their Offices of Chief Justice, and had a Discharge under the Great Seal; therefore the Office may be determined by Surrender, and a Grant to commence upon such Determination, is good. So the King might take Advantage of an Act which amounts to a Forfeiture by Way of Inquisition; therefore tho' a Forfeiture could not be in the Case of an Office at Will of a common Person, yet in the Case of the King there might; but if the Office cannot be determined by Forfeiture or Surrender, yet it would certainly determine by Death; and a Grant of this Office after the Death of M. would be good; for, this being an Office in the Crown to grant, and not being an Office of which any Estate in Fee is in esse, but newly granted; this may be granted to commence in futuro, and to rise and fall, and to be in esse, and not in esse; as well as a Rent may, which may be so granted without Question; and this is not against any Rule in Law, as it would in Case of Lands or Things which pass by Livery or Patent, as Barwick's Case, 5 Co. Rep. Judgment for the Defendant, that the Patent is good.



Roberts *versus* Arthur. Mich. 13 W. 3.

**I**F Letters Patent pleaded are recorded in the same Court wherein the Plea is pleaded, in such Case the Party need not shew them; but where in another Court, he must plead them with a Profert in Curia, or the Exemplification thereof under the Great Seal: Ruled by Holt C. J. (2.) 2 Salk. 497.

## Levari Facias.

Breton *versus* Cole. Mich. 7 W. 3.

**I**N Trespass for Taking the Plaintiff's Beasts, by Virtue of a Levari facias de exitibus terræ, upon an Inquisition of Outlawry; it appeared that the Beasts were levant and couchant on the Land; and the Point in Question was, If upon such a Writ of Levari facias, the Beasts of a Stranger might be taken and sold? Skinn. 617, 618.

Holt C. J. and Court, The Beasts of the Plaintiff being found upon the Land, may be taken by the Levari facias; for there is an express Authority and Command to the Sheriff to levy the annual Value of the Lands, and the Beasts being Levant and Couchant are the Issues of the Land, which are not restrained by Statute to Beasts of the Owner only: And the Land is Debtor to the King, so that if the Beasts of a Stranger should be exempt, the King would be defeated, for he has no Remedy against the Party by Seizing the Land, and therefore he hath it by Levari facias. But where Issues of Lands are forfeit, the whole Inheritance is charged, because the Land is the Debtor, and no Levari facias issues but in such Case; and in all Cases where the Land is Debtor, the Beasts of a Stranger are as liable as of the Owner, as in the common Case of Rents; and if it be so in the Case of a Subject, there is no Reason why any Difference should be made in the Case of the King. Westm. 2. c. 39. 2 Inst. 455.

## LIBELS.

Cropp *versus* Tilney. Mich. 5 W. 3.(1.)  
3 Salk. 225,  
226.

**A**ction of the Case was brought, wherein the Plaintiff declared, that he stood to be elected for a Member of Parliament, and that the Defendant caused a Libel to be printed of him with certain reflecting Words, as spoken by the Plaintiff, by which he lost his Election, ad damnum, &c.

Holt C. J. Scandalous Matter is not necessary to make a Libel; 'tis enough if the Defendant induces an ill Opinion to be had of the Plaintiff, or to make him contemptible and ridiculous; as for Instance, an Action was brought by the Husband for Riding Skimmington; and adjudged it lay, because it made him ridiculous, and exposed him: If Words are false, the Defendant may justify in an Action; but not in an Indictment.

The King *versus* Bear. Trin. 9 W. 3.(2.)  
Carthew 407,  
408, &c.

**T**HE Defendant was indicted at the Summer Assizes in Excester, anno 8 Will. 3. for libelling the King and Government, and the Indictment was in this form following:

That he (the Defendant) 19 Octob. 7 Will. 3. at Buckland All Saints in the County of Devon, subdole, falso & malitiose composuit scripta, & fecit & componi, scribi & fieri causavit, ac sibi procuravit & industrie collegit separal. scandalosos, falsos & seditiosos libellos continen. in se de dicto Domino Rege nunc, & ejus æqua, justa & elementissima gubernatione, quamplurima falsa, malitiosa & seditiosa verba & sententias, materias diction. & expression. (viz.) in uno libello eorum, intitulat. The Belgick Boar, to the Tune of Chivy Chase, Continetur inter alia juxta Tenorem & ad effectum sequen. (videlicet) reciting the Words in English, and after that seven other libellous Ballads were set out in the Indictment in the same Manner as the First, with Juxta Tenorem & ad effectum sequen; and then the Indictment was thus concluded, (viz.) Quos quidem falsos & scandalosos libellos (quorum diversi fuerunt

runt impressi) ipse prædict. Johannes Bear actunc & ibidem, sci-  
licet, eodem 19 die Octob. Anno 7. supradicto apud Buckland  
tout Saints prædict. & diu postea manibus & Custodia suis &  
penes se, scienter & advisate, clandestine & seditiose habuit &  
Custodivit in promptu & parat. ad eisdem inter subditos dicti  
Domini Regis & factiosas, seditiosas & malitiosas personas dis-  
pergend. divulgand. & publicand'.

This Indictment being removed into B. R. it was sent  
down to be tried by Nisi prius, and the Jury found the Ver-  
dict following:

ff. Quoad scriptionem & Collectionem libellorum in indicta-  
mento mentionat. tantum quod defendens est culpabilis; & quoad  
totum residuum in eodem indictmento content. quod defendens  
non est inde culpabilis.

And now it was moved in Arrest of Judgment, and two  
Objections were made for that Purpose.

(1.) As to the Form of the Indictment, for that the  
Charge which was laid to the Defendant was not so cer-  
tain and particular as it ought to be, for the Libels are  
not set forth in hæc verba, as they ought; neither is the  
Defendant charged directly with the writing or making the  
very Words and Sentences expressed in the Indictment,  
but only, that he made and wrote Libels, in which inter alia  
continetur juxta tenorem & ad effectum sequen'.

(2.) Objection was to the Verdict, (viz.) That no Judg-  
ment ought to be given against the Defendant upon this  
Verdict, because the Jury had acquitted him of all that Part  
of the Indictment which was criminal, and found him guilt-  
ty only of writing and collecting Libels, which is rather a  
Folly than a Crime.

Sed per Curiam, it was agreed, That if the Indictment  
had been for a Libel, containing inter alia ad effectum se-  
quen', it would have been naught, but that juxta tenorem se-  
quen. would have been good, because Tenor is the same as  
hæc verba; and 'tis good notwithstanding the Clause inter  
alia, because the Words laid in the Indictment are not ca-  
pable of any Qualification by other Words, so as to excuse  
the Crime.

That upon Indictments thus laid by Way of Juxta Te-  
norem & ad effectum sequen', the very Words laid in the In-  
dictment, and not the Substance and Effect of them, must  
be proved as strictly as if laid to be in hæc verba.

That the Transcribing and Collecting this libellous  
Matter was highly Criminal, without Publishing it, and  
that it was of dangerous Consequence to the Government;  
for



for tho' the Writer or Collector never published these Libels, yet his having them in Readiness for that Purpose, if any Occasion should happen, is highly criminal; and tho' he might design to keep them private, yet after his Death they might fall into such Hands as might be injurious to the Government; therefore Men ought not to be allowed to have such evil Instruments in their Keeping.

2 Salk. 417,  
&c.

Judgment for the King.

Mr. Tuchin. 3 Ann.

(3.)  
St. Tr.

THE Chief Justice observed, That other four Observators in the Information were of the same Nature as Two which he had mentioned, and then goes on and says, you have heard the Evidence, and are to consider, Whether you are satisfied Mr. Tuchin is guilty of writing, composing, or publishing these Libels. They say they are innocent Papers, and no Libels; and they say that nothing is a Libel but what reflects upon some particular Person. But this is a very strange Doctrine, to say, it is not a Libel, reflecting on the Government, endeavouring to possess the People that the Government is Mis-administered by corrupt Persons, that are employed in such and such Stations, either in the Navy or Army.

To say that corrupt Officers are appointed to administer Affairs, is certainly a Reflection on the Government. If Men should not be called to Account for possessing the People with an ill Opinion of the Government, no Government can subsist; for it is very necessary for every Government, that the People should have a good Opinion of it. And nothing can be worse to any Government, than to endeavour to procure Animosities as to the Management of it. This has been always look'd upon as a Crime, and no Government can be safe unless it be punished.

Mr. Montague, the Defendant's Counsel, then moved in Arrest of Judgment. For that the Venire facias was awarded the last Trinity-Term, returnable Die Lunæ prox' post tres Septimanas Sancti Michaelis, and the Distringas, which should have issued the same Day, was sued out the 24th of October, being the Day after the Return of the Venire, so that there was a Discontinuance of the Process.

The Queen's Counsel said, they believed this had been done on Purpose; and admitted it was an Error; but held it was amendable; about which the Court were divided.

Mr.

Mr. Justice Gould and Mr. Justice Powys were of Opinion it was amendable; but the Chief Justice and Mr. Just. Powell held it could not be amended; whereupon Mr. Attorney said, the Court being divided, he knew no Rule to stop Judgment. But Mr. Justice Powys afterwards coming over to the Chief Justice and Mr. Justice Powell, it was agreed there must be a new Trial; and the former Trial was quashed. But I do not find the Suit was ever revived, and Tuchin continued to write his Observators several Years afterwards.

The Queen *versus* Dr. Browne. Trin. 5 Ann.

**T**HE Defendant writ a Pamphlet called Advice to the Lord Keeper by a Country Parson, Wherein he would have him Love the Church as well as the Bishop of Salisbury, manage as well as Lord Haversham, be brave as another Lord, and so gives every Lord a Character ironically; and so 'tis set forth in an Information, and the Jury find him guilty; the Judgment was signed this Morning, which is the 5th Day after the Postea returned; and now a Motion was made to arrest Judgment.

( 4 )  
How a Person may be libelled by ironical Expressions.

Holt C. J. said, 'Twas shewn for Cause to arrest Judgment, that there was no Cause to charge the Defendant, because he said no ill Thing of any Person, and all he said was good of them; to which it was answered and resolved by the Court, that this was laid to be ironical, and whether 'twas so or not, the Jury were Judges; they found it so, for which Reason the Defendant was adjudged to stand in the Pillory, and was fin'd forty Marks; and if this were not a Crime, he might by Contraries libel any Person.

The Queen *versus* Drake. Mich. 5 Ann.

**I**nformation against the Defendant for making a Libel, in which were contained divers scandalous Matters secundum tenorem sequentem, and so setting forth some Paragraphs, and in one of them there was the Word nec instead of non; so that it was not literally the same as in the Libel, tho' it did not alter the Sense.

( 5 )  
3 Salk. 224.  
2 Salk. 661.

By Holt C. J. A Libel may be described either by the Sense, or by the Words of it; and therefore an Information charging, that the Defendant made a Writing, containing

6 Mod. 168.  
8 Rep. 78.  
Hob. 59.  
1 Sid. 148.  
Raym. 74.

taining such Words, is good, and in that Case a nice Craftness is not required, because 'tis only a Description of the Sense and Substance of the Libel: And if the Jury find some Omissions, it will be sufficient, if some Words be proved, in which Case the Plaintiff shall recover; tho' there can be no Tenor of Words, where there is no written Original. But in an Information, charging the Defendant with making a Writing secundum tenorem sequentem, there the written Libel, and that set forth in the Information, must exactly agree; and if any Omission makes a Word of another Signification, it is fatal; because every Word in the Information is a Part of Description of the very Libel it self: So in Trespas quare clausum fregit, if the Plaintiff sets forth Abuttals and Bounds, and fails in the Proof of them, he is gone, because he is obliged to prove his Description; yet he needed not to have described it after that Manner; and there is no Distinction between Wrongs done by Words, and by Things.

5 Mod. 167.

It is here said, that if one repeats, and another writes a Libel, and a Third approves what is writ, they are all Makers of such Libel; for all Persons who concur, and shew their Assent or Approbation to do an unlawful Act, are guilty: So that murdering a Man's Reputation by a scandalous Libel, may be compared to killing his Person; where if several are assisting and encouraging a Man in the Act, tho' the Stroke was given by one, all are guilty of the Homicide.

5 Rep. 125.  
1 Sid. 270.  
1 Mod. 58.

## LIMITATION.

Nightingale *versus* Adams. Hill. 1 W. & M.

(1.)  
1 Show. 91.

Held by Holt C. J. **U**PON the Statute of Limitations, That Dublin, or any other Place in Ireland, is beyond Sea, within the Meaning of that Clause in that Statute: Ruled so by him upon Consideration.



Cheevly *versus* Bond. Mich. 3 W. & M.

CASE on a Bill of Exchange; the Defendant pleads the Statute of Limitations, and the Plaintiff replies, that the Defendant was beyond Sea, &c. (2.) 1 Show. 341

Here Holt C. J. held, That the Defendant's being beyond the Seas, did not stop or hinder, or excuse the Plaintiff in his Suing within six Years; and also, that Bills of Exchange, and other Transactions between Merchants, are not excepted out of the said Statute, but only an Action of Account. It has been ruled no Plea, that the Defendant was beyond Sea, for the Plaintiff might either file his Original, or outlaw him; and a Latitat taken out and continued is a good Avoidance of the Statute: Where the Plaintiff is beyond Sea, his Case is not within the Statute of Limitations; but if the Defendant be abroad, 'tis otherwise. 3 Salk. 228. 21 Jac. 1. c. 16.

Note the Law is altered, in this Case, by the Statute 4 & 5 Ann. c. 16.

Heylin *versus* Hastings. Mich. 10 W. 3.

A Executor brings an Action of Indebitatus Assumpsit for Goods sold by the Testator to the Defendant; and the Defendant pleads Non Assumpsit infra sex annos: Upon Evidence at the Trial it appeared, that the Goods were sold six Years before the Action was brought, &c. But that the Defendant did say to the Plaintiff, when he demanded the Money, prove it and I will pay you. Here the Point in Law was, whether this conditional Promise should revive this Debt, now the Condition of the Promise was performed, viz. by Proof of the Debt, and so bring it out of the Statute of Limitations? (3.) Carthew 470, 471. 5 Mod. 426

Holt C. J. We are all of Opinion, That 'tis a new Promise, and revives the Debt, so as to prevent the Bar by the Statute: For to say, prove it and I will pay you, is as much as to say, If the Goods were sold to the Testator, I promise to pay you for them; and if a Man do acknowledge a Debt within six Years, tho' this is not a Promise, yet it is an Evidence of a Promise, and sufficient to revive it: And here the conditional Promise amounts to a Waiver of the Statute; and altho' no new Promise

Promise was made, an Acknowledgment of the Debt is Evidence of a new Promise.

The Plaintiff had Judgment.

Hide *versus* Partridge.

( 4. )

2 Salk. 424.

Vide Stat. 4

&c 5 Ann.c.16.

1 Salk. 31 to

35.

6 Mod. 11,

12, 25, 79.

Mod. Cases

424.

1 Chan. Cases

152.

2 Chan. Cases

217.

2 Saund. 124,

126.

3 Mod. 244.

1 Lev. 298.

4 Mod. 105.

1 Sid. 465.

1 Vent. 146,

343.

Raym. 3. Winch 8. 6 Mod. 238.

**L**ibel for Mariners Wages in the Admiralty; the Defendant pleaded the Statute of Limitations, and it was over-ruled there. Upon a Motion for a Prohibition it was denied, because the Statute was ill pleaded, but the Plea was afterwards amended.

Holt C. J. said, It was strange that the same Matter well pleaded should be a Defence in one Court, and not in another. This Statute is a good Plea in Chancery; it is true, it is no Plea to a Suit pro violenta manuum, &c. but that is, because the Proceeding is pro reformatione morum; and not for Damages. So at Common Law, 'tis no Plea to an Indictment for Trespass, otherwise in an Action. Adjournat'.

See Evidence.

## L O N D O N.

Watson *versus* Clerke. Mich. 1 W. & M.

( 1. )

Carthew 75,

76.

**A** Pleint in Trespass on the Case was entered in one of the Counters of the Sheriffs of London against Watson; and before any Declaration was delivered to him, an Habeas Corpus cum causa was brought to remove it into B. R. and it was returned generally, that at such a Court venit (Clerke) & affirmavit quendam querelam (versus Watson) in placito transgr' super Casum ad damnum 500l. unde exitus inter partes junct' existit & adhuc pendet indiscuss. &c.

And now it was moved for a Procedendo, upon a Sug-  
gestion, that the Action was commenced in the aforesaid  
Court for scandalous Words spoken of Clerke by Watson,  
(viz.)

(viz.) for calling her Whore, which is actionable there by Custom, but not elsewhere; therefore if a Procedendo should be denied, Clarke would lose her Action; and moreover, by this Means all such Actions would be destroyed and lost against the Custom; and an Affidavit was produced, wherein Clarke deposed, that the only Cause of Action was *ut supra*.

And a Difference was taken between an Action brought on a By-Law, and removed here into B. R. and an Action brought on the Custom of London; for in Case of the By-Law, the Special Matter of such Law ought in certain to be returned upon the Habeas Corpus, &c. otherwise the Court cannot take Notice of such a private Law; but it is not so in an Action founded on a Custom of London, because the Court *ex officio* will take Notice of those Customs.

But the Court did not allow this Distinction.

And Holt C. J. said, that it doth not appear by this Return, what was the Cause of Action; that the Declaration itself ought to be returned upon the Habeas Corpus, and then the Court would see what was the Cause, &c. and if the Writ was delivered before the Plaintiff had declared, yet he ought immediately to enter his Declaration, that it be returned upon the Habeas Corpus, so that the Cause of Action might appear to the Court; and that all the Proceedings ought to be returned in this Case, as well as in an Action upon a By-Law.

Afterwards, the Court considering there was a Danger that the Action would be lost, they allowed the Officer to amend the Return of this Habeas Corpus, and to make it special, *ut supra*.

And thereupon a Procedendo was granted.

*Lewisse versus Masters.* Mich. 7. W. 3.

J. S. dies Intestate in London, and Godspit, his Creditor, attaches Money in the Garnishee's Hand, and it is condemned before the Administration actually granted, it being at that Time contested before the Archbishop.

Holt C. J. It is one Thing if a Custom be different from the Law, and another Thing if it be repugnant to it, and unreasonable. I confess the Custom of Garnishment is reasonable; for there are two Debts discharged by it: For if A. be indebted to B. and C. be indebted to A. now C. standing against B. in lieu of A. by the Payment of that Debt by C. to B. both the Debts to A. and B. are discharged



ged and satisfied. Now in this Case, A. hath at the same Time a Remedy to recover against C. which by the Custom is transferred to B. but in our Case, the Creditor Godspit would have Remedy against Masters the Garnishee, when the Archbishop had none; and would discharge the Garnishee against the Archbishop, who had never any Claim against him, which certainly is absurd, and wholly differs from the other Case; for there A. had a Charge against C. and by his Payment to B. C. is discharged from A. But there can be no Custom to support this Case; for Customs that overthrow the Principles of Law, and which are unreasonable, are to be rejected.

Clark's Case. Mich. 8 W. 3.

(3.)  
3 Mod. 319,  
320.

**U**PON the Return of an Habeas Corpus, they set forth the Charter of the City of London, &c. and say, that in the said City there are several Companies and Societies, and the Company of Vintners is one of them, &c. and that those Companies are under the Government of the Mayor and Aldermen; And they say also, that if any refused to take upon them the Office of a Livery-man of any Company, he might be thereof convicted and imprisoned by the Mayor and Aldermen; and they say, that Clark refused to take upon him the Office of a Liveryman of the Company of Vintners, though he was a Citizen and Freeman of London, and subject to the same; and that therefore the Mayor and Aldermen committed him to the Keeper of Newgate, until he should take upon him the said Office. There were many Exceptions to this Return; and it was insisted, that a Custom to commit a Man to Prison, is a void Custom.

Holt C. J. The Government of all Societies and Corporations we ought, as far as we can by Law, to support, especially this of the City of London; and if the Lord Mayor and Aldermen should not have Power to punish Offenders in a summary Way, then farewell to the Government of the City. But the Exception which strikes with me most is, that it is not set forth that the Keeper of Newgate is an Officer of the City, and indeed I think that he is not quatenus a City, though I confess he is an Officer to the Sheriffs, as he keeps the County Gaol; and it ought to have appeared, that he was committed to an Officer of the Mayor and Aldermen. Afterwards the Party was discharged; though

though all the Court declared, that the Custom was a good Custom, and was for the Advantage of the well Government of the City, and therefore they would always support it.

Tavernor's Case was here quoted, who was chosen a Liveryman of the Vintners Company, and refused to serve; whereupon they assessed a Fine on him of thirty Pounds, according to a By-Law: And it was held, that this was not unreasonable and against Law; for were the Fine more or less, it would not make the By-Law void, it being only to bind the Members of a Corporation; and when a Man doth agree to be of a Company, he thereby submits to the Laws thereof; and the Court is not obliged to take Notice of the Extravagancy of the Charges they lay upon themselves; for it is convenient, to keep up their Reputation and the Honour of the City of London, to have such Power.

1 Mod. 10.  
Raym. 447

City of London *versus* Vanacre. Trin. 11 W. 3.

Holt C. J. THIS Case now stands for the Resolution of the Court.

(4.)  
5 Mod. 438;  
&c.

It comes before us upon a Return to an Habeas Corpus, in which it is set forth, that the City of London is an ancient City, and are a Body Politick, and that King John by his Charter did grant, that the Mayor and Aldermen should chuse any of the Freemen to be their Sheriffs. Then they return the Branch of Magna Charta which relates to the City, and the several Acts of Confirmation, &c. and that it has been a Custom Time immemorial, for the Mayor and Aldermen to make new By-Laws for the Advantage of the City, and that in Pursuance of that Custom, in the seventh of King Charles the First, an Act of Common Council was made, by which it was enacted in Manner following;

5 Mod. 105,  
106, 107,  
156, 157.  
Raym. 447.  
1 Mod. 10,  
164.  
1 Salk. 192,  
193, 341,  
352.  
4 Mod. 27,  
28.  
2 Jones 145.  
1 Jones 162.  
Cart. 68,  
114, 115.  
1 Vent. 21,  
196.  
1 Sid. 284.  
6 Mod. 123,  
177.  
3 Mod. 193.

That the Election of Sheriffs shall be annually on Midsummer-day, and that no Citizen who is elected should be discharged, unless he will take an Oath he is not worth Ten Thousand Pounds; and that if the Person elected shall not appear at the next Court, and give a Bond of 1000 l. to take upon him the Office of Sheriff at the Eve of St. Michael then next following, or shall refuse to take up on him the said Office, or shall not appear at the next Court, that then he shall forfeit 400 l. and if he does not pay that Sum within three Months afterwards, that he shall forfeit 100 l. more.

That

That Vanacre was chosen Sheriff such a Day, &c. but did not appear at the next Court, either to take upon him the said Office, or to make an Excuse for his Discharge, by reason of which he had forfeited the Sum of 400*l*. And whether this Act of Common Council shall be so far obligatory, as to compel the Payment of this 400*l*. is the Question?

And though several Objections have been made, yet we are of Opinion that this is a good By-Law, and that a Pro-*videndo* ought to go.

1. Obj. It is objected, that the Mayor and Aldermen in Common Council have not Power and Authority to make such a By-Law.

2. Obj. That it imposeth Hardships upon the Citizens themselves, in respect to that Oath which they are obliged to take.

3. Obj. That it is unreasonable that he should forfeit 400*l*. if he does not appear at the next Court, and hold, unless they can excuse it; which, say they, makes them arbitrary.

4. Obj. That here is no Provision made that the Party shall have Notice of this Election, that he may have an Opportunity to excuse himself.

Now as to the first Objection, we are of Opinion, that this Privilege of making By-Laws and Ordinances is vested in the City by Common Right, if not by Custom; for that it concerns the Good and better Government of the City. And every City and Town Corporate may, by an essential Power inherent to their Constitution, make By-Laws to the Advantage of the Government of that Body Politick.

Now it is for the Advantage of the City to have such a By-Law, that the Sheriffs should be Ben of Substance, that they may be the better enabled to execute so great a Trust.

As to the second Objection; It is so far from being a Hardship upon the Citizens, that it is a Relaxation of a Burden which lay on them before; for heretofore, though a Citizen was worth never so little, yet he was bound to hold this Office.

As to the third Objection; this Part of the By-Law is for the Advantage of the Citizens, for that they may make any reasonable Excuse that is consistent with their Constitution.

But suppose the Party who is chosen Sheriff makes a good Excuse, and they will not allow it: He may either plead this, or give it in Evidence upon an Action brought.



For their Discretion must be grounded on Reason, and not be fanciful.

As to the fourth Objection, I answer, that every Freeman and Citizen being a Member of the Body Politick, is supposed to be present where the whole Body resides; and though in fact one of the Members should be absent, yet it was his Duty to be there, and he is supposed in Law to be there; he shall be obliged to take Notice of this Election at his Peril. Besides, Proclamation is made in the most notorious Place of the City, viz. on the Hustings, where every Person may take Notice of it.

We are all of Opinion that this is a good By-Law, and that Mr. Vanacre hath justly forfeited the Sum of 400 l. for not complying with it.

See the Argument in the Case at large.

### Cudden *versus* Estwick.

UPON a Habeas Corpus from London; the Return set forth a Custom of London, that Time out of Mind there was an ancient Company of Free Porters in London, and a Custom to make By-Laws for the better governing of the said Company; and in Pursuance thereof, an Act of Common Council, inflicting such a Penalty on any that should employ any not free of the said Company in Portage Work, and that the Defendant did, &c. So the Doubt was, whether such a By-Law inflicting a Penalty upon Strangers, for employing one not free, were good: For it was agreed, that a By-Law that none but a Free Porter should do the Work, would be good with a Penalty. And in Reference to By-Laws in general, a Difference was taken between a private Corporation or Company, and a great City or Borough; for the former can only make By-Laws to bind their own Members, and touching Matters that concern the Regulation of the Trade, or other Affairs of the Company; but great Cities and Towns, as London, Bristol, York, &c. can make By-Laws, for the better ordering and managing such Town, and that Law will bind Strangers to the Freedom of the Town, while within such Towns, and they are bound to take Notice of such Laws at their Peril. And this Diversity was agreed to by the Court.

At last it was adjudged, that no Procedendo should go; and that the By-Law was void to bind a Stranger, who could not have an Action against them for not keeping a

(5.)

6 Mod. 123,

124.

S. C. 1 Salk.

143.

sufficient Number of Porters, nor against the Porters for not serving him. And an Act of Common Council, inflicting a Penalty for buying from any but a Freeman, would be void.

Term. Mich.  
11 W. 3.  
Cases W. 3.  
326.

Holt C. J. An Officer in London may take away some Parcel of the Party's Goods to compel an Appearance; but it must be a reasonable Parcel; and upon an Attachment of Goods there, the Custom is to leave them in the Party's Hands 'till the Matter be determined.

Term. Trin.  
12 W. 3.  
Cases W. 3.  
407.

Holt C. J. We cannot take Notice of a Judgment upon the Custom of Foreign Attachment in London, unless the Custom be specially shewn.

## Lottery Tickets.

— *versus* Layfield, & al'. Before Holt C. J.  
at Nisi Prius.

1 Salk. 292.

**A**ction of the Case was brought for Money had and received to the Use of the Plaintiff; it appeared upon Evidence, that the Defendant and others were Bankers and Partners, and the Plaintiff had given him 20 s. for which he received a Ticket in the Double Exchange Lottery, and the Defendant undertook to pay what Benefit should happen thereupon; the Ticket came up a Benefit of 40 l. and now it was objected, that the Defendant only ought to be charged, and not his Partners.

3 Mod. 222.

Cro. Jac. 411.  
Palm. 283.  
Latch 262.

Holt C. J. It appears in this Case, that they were Partners in their Trade, and Goldsmiths, and the Adventurers put their Money in upon the Credit of the several Goldsmiths; therefore it should be presumed, the Act of the Defendant Layfield was the Act of the others, and should bind them, unless they could shew a Disclaimer, and Refusal to be concerned in it.

The Plaintiff had a Verdict for forty Pounds.

See Decret.

## M A N D A M U S.

The King *versus* Oxenden. Trin. 3 W. & M.

**I**T was argued, that a Mandamus lies to restore a Proctor to the Exercise of his Office, that was unduly removed, because his Business concerns the Administration of publick Justice, and tends to the publick Welfare; now a Mandamus lies for all Offices of a publick Nature, or relating to the Administration of Justice. (1.) 1 Show. 217.

But the Court were of Opinion that no Mandamus lay; that the King hath two Jurisdictions, one Temporal, another Ecclesiastical, and they have different Laws, and different Processes, and they are Judges of their own Officers: This is no temporal Office; that they could not take Notice of what he is, or what Estate he hath, whether for Life, or how; that he is a spiritual Person, and they have Jurisdiction of him; they make, and they may unmake him; they cited Jones 187. 13 Rep. 7. 2 Roll. Rep. 107. and 1 Roll. Abr. 536. and so no Mandamus; by Holt, Eyres and Gregory, Dolben absent, but he was of the same Opinion, &c.

The King *versus* Mayor and Aldermen of Exon.  
Pasch. 3, and Trin. 4 W. & M.

**A** Mandamus at the Instance of Mr. William Glyde, to restore him to the Office of Alderman, &c. Return to it, that he departed from the City, and lived at T. That there were several Courts, and he came not to them; and that he was thereupon removed such a Day, for such his Absence and Neglect of Duty, &c. (2.) 1 Show. 258, 365.

Holt C. J. There ought to go a peremptory Mandamus to restore him; though I agree with my Brothers, that his Desertion of the City, and frequent Absence are Cause of Removal; for an Alderman should be a Citizen and Inhabitant by the Charter. But here is no good Summons; and though he doth commit never so many Causes of Forfeiture, there ought to be a reasonable Summons for him to answer the particular Matters. Now the Absence can be no good Cause, unless he were duly summoned, because  
he



he may shew Sickness, or Business of the King in his Ex-  
cuse. And as to his leaving the City, there is a Possibi-  
lity that he might return again, and if he did return with  
his Family before Removal, possibly it might re-instate him.  
Then this being in a Return, it must be certain to every  
Purpose; if it were in a Plea, it would be well enough,  
and we could intend nothing else than that he continued ex-  
tra Libertat. but being in the Return of a Writ, where there  
is no Opportunity of Answer, it ought to be more certain.  
The rest of the Judges contrar. against the Mandamus.

The King *and* St. John's College in Cambridge.  
Mich. 5 W. & M.

(3.)  
Skin. 359.

**A** Mandamus being granted, and directed to the President  
and Fellows Collegii Sti. Johannis, &c. in Cambridge,  
reciting, that by the A<sup>d</sup> of 1 W. & M. the President and  
Fellows ought to take the Oaths of Supremacy and Alle-  
giance, &c. enjoined by the A<sup>d</sup>, within such a Time, &c.  
and that divers Fellows, scil. A. B. C. &c. had not taken  
the Oaths, by which their Fellowships became void, but yet  
they continued and resided within the College, and received  
the Profits and Benefits of their Fellowships, sicut informa-  
mur, &c. upon which the King and Queen commanded to  
put those Fellows out of the College; & qualiter hoc breve  
fuit execut', &c.

In another Term. Holt C. J. said, This is a publick A<sup>d</sup>,  
of which all Men ought to take Notice, and therefore the  
Master, &c. ought, as a Patron ought to take Notice of a  
Vacancy upon the Statute of Pluralities, and if he does not,  
Lapse will incur; but at Common Law this was at his E-  
lection. And he said, This is an A<sup>d</sup> which executes itself;  
for it is a Judgment and Declaration of a Vacancy, and by  
it their Fellowships are void, without Sentence declaratory,  
or a Motion. And as to their taking the Oaths before a  
Justice of Peace, &c. this was not quatenus Fellows, but  
only by Virtue of the Authority which every Justice has to  
tender the Oaths to Persons whom they suspect, &c. but  
quatenus Fellows they ought to take the Oaths in their Col-  
leges, and, as it seemeth, not elsewhere. He said, that those  
Fellowships are in the Nature of publick Offices, in which  
the Government is concerned, and have a publick Trust an-  
nexed to them, for the Education of Youth.

In another Term. The Court seemed to agree that the Skin. 549.  
 Fellows ought to have been Parties; and for this Cause  
 only they would not grant a peremptory Mandamus; but as  
 to the other Objections, they seemed to think that the Writ  
 was proper enough; for it is the Duty of the Court of  
 King's Bench to see that the Law be executed; and this  
 is the proper Writ. They said, that the King's Counsel  
 might have found another Way; but they did not incline  
 to grant a peremptory Mandamus, but rather econtra.

King and Queen *versus* St. John's College, Oxon.  
 Hill. 5 W. & M.

Serjeant Pawlet moved for an Alias Mandamus to be di- (4.)  
 rected to the President and Scholars, &c. to admit Com. 238.  
 one King to his Scholarship: That Dr. Thomas White,  
 Founder of the College, constituted by Charter fifty Fel-  
 lows or Scholars, whereof two to be nominated by the Ci-  
 ty of Bristol, who have always nominated accordingly; that  
 they last nominated one Baskerville, who surrendered, and  
 then they nominated William King, who hath a Testimonial  
 of his good Behaviour.

Shute got an Instrument signed by the new Mayor, and a  
 few of the Citizens, whereupon the College hath admitted  
 Shute.

Although there be a proper Visitor, yet the Court will  
 not take Notice of that before Return. Sid. 71. Mod. 82.  
 Appleford's Case, that there ought to be a Return.

Levinz contra. The Court may deny a Mandamus, if it  
 appear to be veratious; the Bishop of Winchester is Visitor  
 by the Foundation. King was expelled in Oxon, and ano-  
 ther Bristol Ban taken.

Holt C. J. The Visitor shall determine all that relates to  
 Persons that are of the Foundation; but here is a collate-  
 ral Interest in Bristol, they are no Part of the College;  
 the Visitor hath no Power before a Person be made a Mem-  
 ber; however it be.

Exeat Alias Mandamus.

The King *versus* The City of Chester. Mich.  
6 W. & M.

(5.)  
5 Mod. 10,  
11.  
1 Show. 281.

**T**HIS was a Mandamus to restore nine Persons to their Places of Common-Council Men in Chester. They return, that by Charter granted to them, amongst many other Things, they are empowered to chuse forty Common-Council Men yearly; and that before the Coming of this Writ, these nine Persons were chosen Common-Council Men, and so continued a Year; and that at the End of the Year, debite amoti fuere ab officio per Electionem aliorum.

By Holt C. J. The Return is too short; and we will not restore you on this Writ: It is an Innovation to join nine Men in one Writ of Mandamus; we cannot grant a joint Restitution to them, for it is a several Interest. Tenants in Common may not join in one Action, though they come in by one Feoffment: The Amotion of one is not the Amotion of the other; and it may be for several Faults, the one for Forfeiture, the others for other Reasons. You may agree to take a Declaration, and try it on the Merits next Term.

The Writ was quashed.

The King *versus* Slatford. Mich. 8 W. 3.

(6.)  
5 Mod. 316,  
317, 318.

**A** Mandamus issued to the Mayor and Commonalty of the City of Oxon, to admit Slatford to be their Town-Clerk; and they return, that he had not taken the Oaths according to the Statute 13 Car. 2. but do not say, they did tender the Oaths to him.

Holt C. J. Though a Man, that holds an Office but at Will, may be removed at Pleasure without Cause, yet the Mayor and Commonalty have not here declared their Will to remove him; which they must do, or else we cannot take Notice of it. It is true, the Words of the Statute are very positive, That at the Time of the taking the Oaths of his Office, he shall take the other Oaths, and subscribe the Declaration: And if the Mayor and Commonalty should refuse to administer the Oaths, it is a great Misdemeanour, for which an Information will lie, and it is fineable: Also consider whether an Action doth not lie against the Mayor for not tendering these Oaths, for Damages in losing

13 Car. 2.  
c. 1.  
7 & 8 W. 3.  
c. 27.  
11 & 12 W. 3.  
c. 17.  
2 Jon. 241,  
122.



sing the Place by it, for they ought to have tendered them; and the Words of the Act are, that the Oaths shall be administered. But however, the Party must take them at his Peril, the Words of the Statute being strong against him. This Act was designed to secure the Government in general, and likewise Corporations in particular, therefore at his Peril he is obliged to take the Oaths; and otherwise the Mayor and Commonalty, by Agreement among themselves not to tender the Oaths, might dispense with the Act, which would prejudice the Government: Then the Question will be, if two Justices of Peace have Power to administer the Oaths, in Case of Omission of the Mayor and Commonalty? And if so, the Return is insufficient.

In Trinity Term following. For that by the Statute he might have taken the Oaths before two Justices of the Peace, as well as the Mayor, and they having returned only that he did not take them before the Mayor and Commonalty, it was adjudged an ill Return.

A peremptory Mandamus was granted.

### The King *versus* Cory. Mich. 8 W. 3.

**A** Mandamus was moved for to the Justices of Peace, for that they had proceeded to remove W. R. from his Place of Abode, after he had offered to give Security to indemnify the Parish. (7.)  
3 Salk. 230, 229.

Holt C. J. In a Matter of Right, as where a Mandamus is prayed to restore a Man, &c. we never require an Affidavit of the Fact; but here it is required, being upon a supposed Failure of Duty in the Justices; and therefore a Mandamus ought not to be granted till such Affidavit is made, &c.

And in another Case Holt C. J. held, that a Man shall not be deprived of his Liberty for Poverty, though he may be of Bagistracy. See Stat. 8 &c 9 W. 3. c. 30.

### The Mayor of Coventry's Case. Hill. 9 W. 3.

**O**n a Motion for an Attachment against the Mayor, for not returning a Writ of Alias Mandamus. (8.)  
2 Salk. 429.

By Holt C. J. If a Mandamus issue out of Chancery, no Attachment lies till the Pluries, for that is in Nature of

Mod. Caf.  
35.

of an Action to recover Damages for the Delay; but upon a Mandamus out of this Court, the first Writ ought to be returned; though an Attachment is never granted without a peremptory Rule to return the Writ, and then for the Contempt Attachment goes out.

A peremptory Rule was made.

Buckley *versus* Palmer. Trin. 11 W. 3.

(9.)  
2 Salk. 430,  
431.

**A**N Action for a false Return; and Verdict found for the Plaintiff; and now a peremptory Mandamus was moved for, but it was opposed by the Defendant.

4 Mod. 34,  
233, 236.

Holt C. J. When an Action is brought for a false Return, and that is falsified, we cannot refuse a peremptory Mandamus: But this Motion here cannot be made till four Days are past after the Return of the Postea; because the Defendant hath so long Time to move in Arrest of Judgment.

The King *versus* The Mayor, &c. of Abingdon.  
Mich. 11 W. 3.

(10.)  
2 Salk. 431.

**M**andamus to the Mayor, Bailiffs, and Burgessees of Abington. The Mayor made a Return, and brought it into the Crown-Office, intending to move to have it filed; and now a Motion was made to stay the filing of it, upon Suggestion, that it was made by the Mayor and Minor Part of the Bailiffs and Burgessees; and that the greater Number would have obeyed the Writ; and therefore they prayed they might disavow it, and put in another.

2 Salk. 479,  
699, 701.  
Carth. 499,  
500.  
Comb. 41,  
213.  
6 Mod. 133.

Holt C. J. Where a Writ is directed to a single Officer, as a Sheriff, and a Return is made without his Privy by a Stranger, he may any Time that Term come in and disavow it, but not after. Dy. 182. But in this Case, where the Writ is directed to several, and the Mayor, who is the principal Person, returns it, we shall not examine upon Affidavits, whether the Majority consented, but leave you to punish the Mayor, if he be guilty. The Return was filed, and at the same Time Leave was given to file an Information against the Mayor.

The King *versus* The Mayor, &c. of Abingdon.

**A** Mandamus Majori, Ballivis, & omnibus principalibus Burgenſibus Burgi de A. (except R. and S.) ſet forth the Conſtitution, and that R. and S. were Capital Burgeſſes, choſen by the Commonalty to ſerve for Mayor for the enſuing Year, and that they were to chule one of them; ſo they were commanded to elect one of them. They returned the Stat. 13 Car. 2. ſeſſ. 2. c. 1. and that within twenty Years prox. poſt 25 March 1663, R. and S. fuerunt electi Burgeſſes principales; and within a Year before their Election had not received the Sacrament, per quod electio eorum vacua devenit, & non ſunt principales Burgeſſes. This Return was held naught. 1ſt, The Court conſidered it without the laſt Words, et non, &c.

(11.)  
2 Salk. 432,  
433.

4 Mod. 233.  
3 Mod. 72,  
118.  
5 Mod. 432.  
433, &c.  
2 Show. 68,  
475.  
2 Saund. 289.

And Holt C. J. ſaid, The Writ ſuppoſes them to be Burgeſſes, and ſo the Court muſt intend them; and this is not answered by the ſpecial Matter of the Return, which ſhews only that he was once elected, and that was a void Election; whereas he might qualify himſelf, and be choſen again.

2dly, The Court conſidered it with the laſt Words, and held the Et non ſunt principal. Burgeſſes, &c. to be only Part of the Conclusion or Inference.

2 Salk. 430.  
pl. 5. &c.  
436, 586,  
699.  
Mod. Caſes  
89.

And Holt C. J. ſaid, The Law requires the moſt exact Certainty in theſe Caſes, becauſe the Party cannot traverse nor interplead. And it is not enough to offer a Matter ſo that the Party may be able to falſify it in an Action, but the Matter muſt be ſo alledged that the Court may be able to judge of it, and determine whether it be a ſufficient Cauſe or not. If the Matter ſet forth in this Return had been ſo alledged in a Plea in Bar, the Plaintiff might have replied a ſubſequent Election; ergo this Return is uncertain; for there might have been a ſubſequent Election.

*The Caſe of Andover.* Mich. 12 W. 3.

**F**IVE Perſons cannot have one Mandamus to be reſtored; for the Foundation of the Writ is the Wrong in turning them out, and the turning out of one is not the turning out of another. Per Holt C. J. See 5 Mod. 10, 11. 1 Sid. 209. 2 Salk. 436. pl. 19. Comb. 307, 308. 6 Mod. 18. 1 Show. 258, 260, 281, 364.

(12.)  
2 Salk. 433.



Term. Hill.  
13 W. 3.  
Cases W. 3.  
666.

Notion for a Mandamus to swear in a Steward of a Copyhold Court.

Holt C. J. The true Reason of Mandamus was, when Aldermen, Capital Burgessees, or such other Officers concerning the Administration of Justice, were kept out, to swear them into, or at least restore them into their Places; and we ought not to grant it to swear a Register for a Bishop, though it be an Office of a publick Nature. And he said, he would not care to do it for the Steward of a Leet; though heretofore it were used to swear a Physician of the College; and it is rare to grant it where one has any other Remedy: And here it is a private Officer to do Service for the Lord; and it was not granted.

The Queen *versus* Twitty and Maddicot. Mich.  
1 Ann.

(13.)  
2 Salk. 433,  
434.

**M**andamus to swear A. and B. Church-wardens, suggesting that they were debito modo electi. The Return was, quod A. & B. non electi fuerunt debito modo. It was objected, that it ought not to be debito modo, and it ought to be in the Disjunctive nec eorum alter elect' fuit.

5 Mod. 10,  
11.

Holt C. J. 1st, One cannot be sworn upon this Writ; for either both were chosen, or the Writ is misconceived. 2dly, Where the Writ is to swear one debito modo electus, quod non fuit debito modo elect', is a good Return, for it is an Answer to the Writ: But where it is to swear one electus Church-warden, there quod non fuit debito modo elect' is naught, because it is out of the Writ, and evasive.

The Queen *versus* Chapman Mayor of Bath.  
Pasch. 3 Ann.

(14.)  
Mod. Caf.  
152.

**A**n Information was brought against the Defendant, for making a false Return to a Mandamus, which commanded him to proceed to the Election of a Town-Clerk in the Room of one B. To which he returned, that before the Arrival of the Writ, J. S. had been duly chose, and sworn into the said Office. And it appeared on Evidence, that the Right of Election was in thirty Common-Council Men; and that the Mayor at such a Time had summoned them to meet, in order to the Election; that twenty-eight met, and  
three

three Candidates were set up, and two of the twenty-eight voted for one; that thirteen voted for another, and the Mayor and twelve more voted for the third; and that the Mayor, pretending to have a casting Vote, declared his Son duly elected, and at another Court swore him.

Holt C. J. There needs no more Evidence to prove this Return to be the Mayor's, but the Copy of the Writ and Return thereof in the Crown-Office. And this Action for a false Return may be brought against the whole Corporation, or against any particular Member of it; and the Mayor or other head Officer, of common Right, has no casting Voice, but such a Thing may be by Prescription or Charter, though not otherwise: If there be an Equality of Votes, and therefore they cannot choose, upon a Mandamus they must agree, or else they shall be all brought up as in Contempt, and laid by the heels 'till they agree therein; but it suffices that a Majority do agree. 5 Mod. 404.

The Mayor was found Guilty.

The Return of a Mandamus was received and filed, tho' the Majority of the Corporation did not consent to it; and at the same Time Leave was given to file an Information against the Mayor: But they could not disavow this Return, and put in another. Per Holt C. J. 2 Salk. 431, 432.

The Queen *versus* The Bailiffs, &c. of Ipswich.  
Serjeant Whitacre's Case. Hill. 4 Ann.

**M**andamus Ballivis, Burgensibus, & Communitat' Villæ de Gippo, to restore Serjeant Whitacre to the Office of Recorderhip. The Return was, Responsio Ballivorum, Burgensium & Commun' Villæ de Gipwico, sive Burgi Gipwici, patet, &c. Nos ballivi, &c. return the Constitution, and that the Recorder is amoveable pro malegesturis, per Ballivos & Burgenses, vel major' partem eorum, quorum Ballivos duos esse volumus. Then shew Serjeant Whitacre chosen to continue ad libitum, and that at such a Sessions of Peace, he gave Notice, but did not attend, and that having Notice, he appeared and answered; and by the Bailiffs, Burgeses and Commonalty (the Bailiffs being then present) he was turned out. Et ulterius certificamus quod Inhabitantes Villæ prædictæ nunquam nuncupati fuerunt per nomen Ballivorum, Burgens. & Com' Villæ de Gippo, &c. This Case pended long, and was often argued upon several Objections. (15.)  
2 Salk. 434,  
435.  
2 Salk. 452,  
658, 431.  
1 Salk. 145,  
146, 151.  
1 Sid. 64.  
Hardr. 97.  
1 Lev. 50.

The

The whole Court held, that the Bailiffs being said to be present, should be intended to be consenting, either actually, or as included in the major Part. Also, that the Recorder is bound to attend and assist at the Sessions, and that his Non-attendance is a good Cause of Forfeiture. They also held, that though the Summons or Notice Serjeant Whitaker had to answer, set no Time when he should appear, yet his appearing and answering cured that Defect. Palm. 453. But in this Case, his Notice was to answer his Non-attendance at a Sessions of Oyer and Terminer, whereas he is turned out for Non-attendance at a Sessions of Peace; and indeed answered to that, though not charged therewith, which the Court held incurable and fatal; and ordered a peremptory Mandamus, and that it should be directed according to the first Writ, viz. Villæ de Gippo, and must not differ. Raymond objected to a peremptory Writ, because he was only Recorder ad libitum; (1 Sid. 14.) non allocatur, for the Corporation have not returned that.

The Queen *versus* The Mayor and Aldermen of  
Norwich. Pasch. 5 Ann.

(16.)  
2 Salk. 436.

2 Salk. 586,  
589.  
1 Show, 180.  
3 Lev. 46.  
Lutw. 130.  
Mod. Cases  
211.  
3 Mod. 114.

**M**andamus to admit Dunch to be an Alderman of Norwich; they returned a Charter of E. 4. Quod Aldermani onerentur & exonerentur prout in London; and that in London, if a Person be elected Alderman by the Ward, the Court of Aldermen may refuse him; and that D. was elected by the Ward, but refused by the Mayor and Aldermen, because he had not received the Sacrament infra annum tunc prox' antecedent' Electionem suam; and that he was factious, and procured his Election by Bribery; Et quod non fuit electus. The Court agreed, that several Causes might be returned, and that either not qualified, or not elected, had been a good Return.

But Holt C. J. questioned whether Bribery would vacate the Election, because the Office did not appear to concern the Administration of Justice. The whole Court agreed, that as soon as D. was chose by the Ward it was an Election; and that the Aldermen did but approve; and that before Approbation, the Election was complete. It follows then that this Return is repugnant; for first they admit an Election, and avoid it, and yet at last they return there was no Election.

A peremptory Mandamus was granted.



The Queen *versus* Serjeant Whitacre. Mich.  
5 Ann.

**T**HIS Case was argued by Mr. Whitacre for the Serjeant, who said, first, that Villa de Gippo & Villa de Gippvico are all one Name, for the one is only an Abbreviation of the other; it is not idem in literis; but if it be idem in sensu & in re, that is sufficient. 10 Co. 124. 4 Leo. 11. Where a Corporation was incorporated by the Name of Master, Brothers and Sisters of the Hospital of the Blessed Mary Virginis; and they made a Lease by Indenture, leaving out the Word Virginis; yet the Lease was held good; so it was resolved in Dr. Arurray's Case. 11 Co. 20. a. b. For if the Substance be the same, it is sufficient, so that immaterial Variances will not hurt; so is Moor 71. Where there was an Incorporation by the Name of the Dean and Canons of the King's Free Chapel of his Castle of Windsor, and they make a Lease by the Name of Dean and Canons of the King's Majesty's Free Chapel of the Castle of Windsor, yet this Variance did not hurt: And there are Cases where greater Variances will not vitiate their Grant. 1 And. 196. Moor 266. 1 Leo. 162. 3 Cro. 338. & Moor 361. Here the Town of Ipswich was known as well by the Name of Villa de Gippo, as by the Name of Ville de Gippvico, for that appears by several Records; and if so, the Cases put 6 Co. 65. b. 66. a. are Authorities in Point for us. Besides, I take the Names to be the same, for Villa is described by Spellman in his Glossary, so. to be two Sorts, Villa Muralis, and Villa Ruralis; now the Word Vicus is the same Thing in Signification, for it comes from the Saxon Word Vic, which signifies a Town, City, or House, so that Villa and Vicus signify the same Thing, according to the Subject Matter: So that Villa de Gippo and Gippvicus signify the same, and are at least the same in Substance, the Town of Gipp; if not so, it may be taken as an Abbreviation of Gippvicus, v. 38 H. 6. 33. where it was pleaded, that such a Person resigned to J. Bishop and Ordinary of that Place; the Letter J. may stand for divers Names, and yet here it was taken for John. To which it was answered, that the Bishop of N. had been enough, and that no Name was necessary. King H. 7. made a Gift, and the Patent had these four Letters, H. R. A. E. and this was taken to be an Abbreviation of Henricus Rex, Angliæ Franciæ;

the Case of Down and Hathwait, Cro. 418. Joanes for Jo-  
hannes was in an Obligation, and held good; the same  
Case is in 1 Jones 366. where the Word is Jo'em for Johan-  
nem, and held good; likewise the same Case is in Abr. 2.  
Ro. 136. 11. and there the Words are, Noverint Universi me  
Johan. Hathwait teneri, &c. and this was taken an Abbrevi-  
ation of Johannem; so here you will take Gippo to be an Ab-  
breviation of Gippvico.

Second Point; If you will take them to be different Cor-  
porations, yet they are concluded by their Return to the first  
Mandamus, for there they plead in chief, and tell the Court  
the Reasons that induced them to turn out their Recorder;  
and when they have done that, they come to trifle with this  
Court, and say in their Return, & ulterius certificamus quod  
Ballivi, Burgenses, & Inhabitantes, were not incorporated by  
that Name; so that first they admit and answer the Manda-  
mus, then they say the Mandamus was not directed to them:  
Then this Court examined the Causes alledged in the Re-  
turn for his Amoval, and this Court adjudged them insuffi-  
cient; and shall it now be said in answer to a peremptory  
Mandamus, that the Court was trifling all the Time of that  
Debate and Judgment, and that what they did signifies no-  
thing? Surely they shall not now be admitted to alledge  
Disnomer. Dyer 279. 9. Moor 897. Where a Man has  
bound himself in an Obligation by a wrong Christian Name,  
he shall be estopped by his Bond to say that the Bond was  
given by a wrong Name; a fortiori, when they are estopped  
of the Record by their Answer in chief. 19 H. 6. 1. a. b. &  
44. a. They might to the first Mandamus have insisted on  
this, but now they are concluded by their Admittance.

Keelyng held, that if a Mandamus was directed by a wrong  
Name, and the Corporation answered by their right Name,  
the Return is good. 1 Keb. 623. There is no Answer to  
be made to a peremptory Mandamus, but Obedience to be  
paid to it; therefore I pray that your Lordship will amerce  
this Corporation.

Raymond: Mr. Whitacre prays an Amerciament, but he  
does not tell us who should be amerced, Gippo or Gippvico.  
He tells us that the Court was trifled with, but I say it is  
they that have trifled with the Court, and not we, for we  
shewed them their Fault at first; and if we went further, it  
was ex abundanti at least; we shewed no Disrespect to the  
Court thereby, because we did more than we needed or  
ought to have done. As to his first Point, I thought he

had given it up, for I thought the Court were pretty clear, that Gippo and Gippvico were not the same; neither do I think them the same in re or sensu, for he does not tell us what Gipp is; and if Villa de Gippo and Gippvico be the same, as he endeavoured to prove, yet in our Case, Villa is de Gippo and Gippvico both; so that, as he would have it, they cannot be the same; therefore, I hope, the Court will see no Reason to think them the same. Now to amerce the Town of Gippo I see no Reason, because they have done nothing, and the Town of Gippvico have committed no Crime, for they only did more than they needed, which by no Means can be criminal.

As to the second Point, I think there is no Estoppel in the Case, because this is a distinct Writ, and a distinct Record; and though this be a peremptory Mandamus, to which Obedience is to be paid, yet none is to pay Obedience to it but those to whom it is directed. They say, we did admit the first Writ by answering to it, ergo we allowed it; surely this is argumentative, and will not conclude us. The Cases cited by Mr. Whitacre are most of them by their Christian Names only, for a common Person is apparent and obvious, but a Corporation are distinguishable but by their Name only, for it is only a Thing in Speculation or Imagination, therefore are quite different as to their Rights, and you have no Way to conceive a Corporation but in Imagination, so that their Name is the only Way we can know a Corporation; yet it is said and resolved, that a Man cannot be estopped by his Christian Name, though by his Surname he may. *Lutw. 519, 894.* As to what he says, that Corporations have not avoided their Grants which were not by their right Names, I cite the Book and Case cited on the other Side, *10 Co. 123. b. 124.* where several Corporations have avoided their own Grants; and if they be not estopped by their own Grants, they shall not surely be estopped by their Return to Writs; besides, Estoppels must be reciprocal, and that is the Reason, if I take a Lease of my own Land from an Infant or Feme Covert, by Deed indented, yet I am not thereby concluded; nor am I concluded by taking Letters Patent of my own Lands from the King; for the same Reason therefore, this being a Pleading or Return to the Queen's Writ, we cannot be estopped: Besides, as I said, there are two distinct Records, for which Reason, I hope the Court will not amerce us.

Whitacre



Whitacre replied, a peremptory Mandamus is but a Continuance of the first Writ, and therefore but one intire Record.

Holt C. J. May not a Corporation be estopped by their Warrant of Attorney? Surely they may, and the Judgment shall be against the Corporation by that Name, and also Execution shall be executed upon them thereon; and here the Question is, Whether you are not estopped by your Return.

Powell J. We agreed Gippo and Gippvico cannot be intended to be the same, and that Gippo could not be an Abbreviation of Gippvico. If a Man is sued on his Bond which he gave by a false Name, and appears to it, he is estopped, and so is a Corporation; he has owned the Writ to be good by answering over: Suppose an Action is brought against John of Styles, and John of Downs appears of his own Head, and pleads to it by the Name of John of Downs, surely this shall not conclude him to be John of Styles; so here the Corporation of Gippvico come by their own Name, and answer a Writ directed to the Corporation of Gippo.

Holt C. J. They come here and say, they were incorporated by the Name of Gippvico, and yet they might have the Name of Gippo also, and we shall take them both to be the same, and not different; besides, I think this at present, that 'tis an Estoppel; to which Gould accorded.

Powell and Powys inclined to a contrary Opinion, but then the Court was told, that several Considerations of Oyer and Terminer went thither by the Name of Gippo, which the Court thought was very material. Adjournatur.

The Serjeant had a peremptory Mandamus and was restored, and the same Day there were Articles of his Misbehaviour given to him, and he was to shew Cause by a Day to come, why he should not be removed; and it seems they did remove him the subsequent Day, being the 6th of this May, and

Raymond now moved, that the Return of the peremptory Mandamus should be filed; and 'twas said of the other Side, that the Removal was a Contempt to this Court; for the same Day that he was restored, they exhibited Articles before he was levant and couchant on his Freehold, and compared it to an Habere facias possessionem to a Sheriff, when he gives Possession, then to have others in Readiness to take the Possession from him, which is a Contempt.

Curia: The Cases are not alike, for tho' the Sheriff delivers Possession, yet a Declaration in Ejectment may be delivered the same Day, which is well; so here; and the Return was filed.

The Queen *versus* Trubody. Pasch. 5 Ann.

**M**Andamus to restore Trubody to his Place of Capital Burgeſſes for the Town of Leſtwithiel, and they return, the Town was compoſed of a Mayor and ſix Capital Burgeſſes, and that when one of the Burgeſſes died, or was removed, the Mayor and the other five Capital Burgeſſes had Power to remove any Burgeſſes for Miſdemeanors in his Office, or for neglecting his Duty in Relation to his Place of Burgeſſes; that the Defendant did, at ſuch a Time, totally abandon the Town, and went to live fourteen Miles out of the Town with his Family; ſo he abdicated the Town and the Service thereof; that at ſuch a Time one John B. was Mayor, and that he aſſembled the Reſt of the Burgeſſes, and that the ſaid John being ſummoned, and not appearing, he the ſaid John Trubody was removed by the ſaid Mayor and Burgeſſes.

(18.)  
A Non-reſi-  
dence is a  
good Cauſe  
to remove a  
Member of a  
Corporation.

Fiſt, The Court agreed, that this was a good Cauſe to remove him, and the Lord Chief Juſtice cited the Caſe of one Clide, who was removed from being a Burgeſſes of Exeter, for going to live at a Place that was only four Miles diſtant from the Town with his Family, and ſo abdicated his Office; for a Perſon that is a Magiſtrate of a Town is to be preſent at all Times to aſſiſt, and he likened it to the Reſidence of a Parſon, who muſt ever live in his Pariſh; and if he lives within half a Mile, or within the Sound of the Bell thereof, 'tis not ſufficient.

Powell J. ſaid, That differs from this Caſe, becauſe the Parſon having the Cure of Souls, is to be always within Call of the Pariſhioners; but yet in this Caſe he held Trubody well removed; then,

Sir John Hollis ſaid, That the Return was not good, for that 'tis the ſaid John being ſummoned, &c. the ſaid John Trubody was removed, and the Word ſaid refers proximo antecedenti, and that is John the Mayor; ſo that John Trubody was not ſummoned; but the Court held it well enough, for ſaid ſhall refer to the next antecedent, if it does not break the Senſe, as here it would do; then he objected, it does not appear, that all the five Capital Bur-

gessees were present at his Removal; the Court said, they took that to be well enough as 'twas returned.

*Regina versus The Mayor, Aldermen and Common Council of Gloucester.* Hill. 8 Ann.

(19.)

**A** Mandamus was directed to the Mayor, Aldermen, and Common Council of Gloucester, to restore Lane to be a Capital Burgess. They return their Incorporation by several Charters, and by the last by the Name of the Mayor and Burgessses of the City, &c. and that when any Man is chosen, he is to continue for Life; but the Mayor, &c. may remove him; and then they return, that Lane was duly elected; but that he wrote a scandalous Letter to C. who was, and still is an Alderman of that City, which they set forth.

And then they return, that upon the 16th of at a Common Council then held, he being there was charged with writing this Letter, and that he did not deny it; but gave his Consent to be removed, and he was removed by the Common Council.

Mr. Snell, upon this Return, moved for a peremptory Mandamus. It is said in Bage's Case, 11 Co. 98. a. b. that no Words are a sufficient Cause to remove any Man. This is not contrary to the Duty of his Office. 1 Ven. 302, 327.

Holt C. J. This is an Offence that a Man may be punished for; but it is not fit that a Common Council should try a Thing that is triable at the Common Law. There ought to be a Jury, and when they have convicted him, then this may be a Cause to turn him out.

Powell Just. This is more than Words, because the Fact done is a Libel; but they cannot take upon them to turn him out before he is convicted.

Holt C. J. Where a Man doth an Offence against the Duty of his Office, he may be turned out.

Mr. Letchmere: The Question is, Whether or no there ought to be an antecedent Conviction? But I submit it to the Court, what Effect the Consent of the Party will have, and so whether he is entitled to a Writ of Restitution? 1 Sid. 14. I do not think that a Consent of the Party is a Resignation; but if it is parallel to a Resignation, it will be sufficient, and this amounts to that; but if not, yet it is a Judgment against him by his own Confession.



Powell Just. A Man may resign an Office by Parol, but they have not returned it so.

Holt C. J. I do not take a Consent to be turned out, to be a Resignation. If he doth admit the Fact, he admits what they have no Power to examine.

Powell J. Doth the Writing of a Libel touch the Duty of his Office?

Letchmere: He chargeth him with robbing the City.

Holt C. J. Is that an Injury to the Franchise, to charge an Alderman with Robbing of the City.

Letchmere cited Style 477.

Holt C. J. That was contrary to the Duty of his Office to enter that, which was no Act of the Court, as an Act of the Court.

Letchmere: If a Man hath an Office, and will not take the Oaths, you will grant a Quo Warranto against him before Conviction.

Sir Edward Northey, ad idem: Where a Man is of a Corporation, and he consents to be turned out, they may remove him; and that is sufficient. If a Man will consent to be discharged, it is a Surrender; and that may be done by Parol, which is settled in the Case of Johns v. Jennings. 1 Sid. 14. But then another Matter is, Whether this Writ is good; for by the Charter of Charles II. they are to be called by the Name of, &c. of the County of the City of Gloucester, and this is directed to the Mayor, Aldermen and Common Council of the City of Gloucester.

Powell J. A Mandamus may be directed to them, by the Name of the Corporation, or to those that have Power of Removal.

Per Curiam: A peremptory Mandamus was granted.

*Vide Corporations.*

## M A N O R.

Tonkin *versus* Crocker and Billing. Trin. 6 W.  
& M. Rot. 507.

<sup>2</sup> Lutw. 1211.  
<sup>2</sup> Salk. 604.

**T**onkin brings Replevin against Crocker and Billing, for a Brass Pan taken at S. in a Place called the Kitchen.

They make Conuſance as Bailiffs of William Mohun, and ſay that before the Time when, &c. H. Tonkin was ſeiſed in Fee of a Meſſuage and fifty Acres of Land in Trewertha, and held the ſame of the ſaid W. Mohun, as of his Manor of Mythian, by Fealty and 4s. Rent, and Suit to the Court of the ſaid Manor, to be held twice a Year, and that W. Mohun was ſeiſed of the Services by the Hands of the ſaid H. Tonkin, and for one Year's Rent in Arrear, &c.

Tonkin, proteſting that Mohun was not ſeiſed of the Services, ſays that he held the Tenement of W. Mohun, as of his Manor of Mythian, by four Shillings Rent only; without that, that he held by Fealty, four Shillings Rent and Suit of Court. The Defendants reply, and take Iſſue upon the Traverſe.

A Special Verdict finds, that Mythian is an antient Manor, of which W. Mohun was, &c. and is ſeiſed in Fee, and that there was an antient Court held before the Steward twice a Year, from Time whereof, &c. and that it had ſeveral Freehold Tenants and ſeveral Suitors, and that Tonkin and his Anceſtors were free Tenants, and held the ſaid Tenement from W. Mohun, &c. by the Services in the Conuſance; they further find, that for twenty Years laſt paſt there has been only one free Tenant or free Sutor, viz. the ſaid H. Tonkin, but that from Time whereof, &c. there were and now are ſeveral cuſtomary and conventionary Tenants of the ſaid Manor, and that the Defendants took the Brass Pan for Rent and Services arrear; and it upon the whole Matter aforeſaid, &c.

This Caſe was firſt argued by Darnel, the King's Serjeant, for the Plaintiff, and Levinz for the Defendant. And for the Plaintiff 'twas ſaid, that a Court-Baron was of Right incident to every Manor. 13 E. 4. 18. 3 Cro. 791. Pill and Tower's Caſe, that there is no Manor without a

Court.

Court-Baron. 1 Bul. 55. There may be a Customary Manor, Co. 11. 17. Nevill's Case, but that hath not a Court-Baron; there cannot be a Court where there is but one Suitor. Co. 4. 26. Melwich's Case.

The Court in the Cognizance is to be intended a Court-Baron, according to the common Acceptation of the Law; but the Court found by the Verdict is a customary Court, and then a Special Prescription for it ought to have been alledged in the Cognizance.

On the other Part, it was said, that there may be a Court-Baron held before the Steward, 1 Mod. Rep. 173. 1 Cro. 497. James and Turney's Case, and that the Manor was not destroyed altho' there was but one Tenant, and for this 1 And. 256, 267. was cited, and that the Plaintiff has confessed that it was such a Manor. It was afterwards argued by Gould the King's Serjeant, for the Plaintiff, and by Lutwyche for the Defendants; and on the Plaintiff's Part 'twas argued much to the Effect before-mentioned; but moreover an Exception was taken to the Cognizance, which saith that H. T. tenuit, &c. de W. M. ut de Mancio suo de M. whereas a Seisin in Fee of the Manor ought to have been alledged; sed non allocatur; for the Precedents are as the Pleading is here.

On the Part of the Defendants 'twas said, that by the Pleadings and Verdict in this Case, it could not come in Question, Whether the Manor continued or not; for it appears by the Agreement of both Parties in the Pleadings, that there was a Manor of Mythian.

The Defendants in their Cognizance say, that the Plaintiff held the Place in quo, &c. of the said W. Mohun, as of his Manor of M. and then the Bar to the Cognizance expressly confesseth (and not only by the Way of not denying) that the Plaintiff held the Lands of W. M. ut de Mancio suo præd. by the yearly Rent of 4 s. and then traverse the Tenure by Fealty, 4 s. Rent, and Suit of Court, so that the only Dispute between the Plaintiff and the Defendants is quoad the Quantum of the Services.

Then the Verdict finds, that before the Taking, &c. the Manor of Mythian was an ancient Manor, and that W. M. is, and at the Time of the Taking was seised of the said Manor in Fee; and they further find that a tempore cujus, &c. there hath been an ancient Court held before the Steward of the Manor bis per Annum, and that there were several free Tenants and Suitors to it, and that the Plaintiff and his Ancestors were Tenants of the Manor by



the Services mentioned in the Cognizance; and in all this the Verdict agrees with the Cognizance in all Circumstances but one, viz. that the Verdict finds the Court to be held before the Steward, and the Cognizance doth not mention before whom 'twas held (as it need not); but that doth not make any material Difference: For the Jury find the Matter of Fact as it is; and in Fact all Courts-Baron are held before the Steward, altho' the Suitors are the Judges. In 4 Inst. 267. the Lord Coke saith, that in an Hundred Court, the Suitors are the Judges, yet the Stile of the Court is Cur' E. C. Mil' Hundredi sui de B. tent' coram A. B. Seneschallo, ibidem, and fol. 268. he says the same Thing of a Court-Baron. And this is agreeable to divers Precedents in Pleading. Co. Entr. 118. D. Rast. Tit. Replev. in Amercem. 2. Co. Entr. 570. b. Winch's Entr. 1014. And for Authorities that it may be so. 2 Jo. 22, 23. Eure and Wells's Case. 1 Mod. Rep. 173.

Then the Question is, Whether the subsequent Matter found in the Verdict, viz. that for twenty Years last past there has been only one Freeholder, (admitting that this destroys the Manor) should be regarded, by Reason that it is repugnant to the Matter found before; and to the Agreement of the Parties themselves in Pleading.

And as to this, the Court would not take any Notice of it, because the Jury is only sworn to try the Matter in Controversy between the Parties; and if the Jury shall be permitted to make Questions and Disputes of Things on which the Parties were before agreed, it would be of ill Consequence. And there are several strong Authorities to that Purpose; but I will only Name them; 28 Aff. pl. 34. 48 E. 3. fo. 19. Nu. 42. 2 Co. fo. 4. b. Goddard's Case, 3 Leon. 80. Pepy's Case 209. Paramour and Johnson's Case, 1 Leon. 323. Norwood and Denny's Case, Savil 112. Palmer 19. Sir Henry Wallop's Case, Owen 91. Kayre and Durat's Case, Bro. Confession, 27. 2 Mod. Rep. 4. and Roll. Trial 692. many Cases.

And after, by the unanimous Opinion of the whole Court, Judgment was given for the Defendants on this last Point only. But it was said by Treby C. J. that it might be a Court-Baron, altho' the Jury have found that 'twas held before the Steward.

A Writ of Error was afterwards brought in B. R. and the Case was argued there on the same Points as were made in C. B. and 'twas strongly argued on the Point, Whether the Court mentioned in the Cognizance, to which the

the Prescription is to have Suit, is not another Court than the Jury have found; and for this it was objected, that the Court mentioned in the Cognizance shall be intended a Court-Baron; and for that Purpose 1 Leon. 218. was cited, where 'tis held by Periam Just. in the Lord Cobham's Case, that if one in Pleading entitles himself to a Court appertaining to his Manor, it shall be intended a Court-Baron; and in F. N. B. 76. D. it is called Curia Manerii; and if the Pleading intends another Court than a Court-Baron, then a Title ought to be made to it; but it is otherwise of a Court-Baron, because that is incident to every \* Manor. Yelv. 192.

Then the Court found in the Verdict cannot be intended a Court-Baron, tho' it be such customary Court in Jurisdiction; for 'tis found to be Cur' Manerii held coram Seneschallo, whereas the Court-Baron is held before the Suitors, and they are Judges. And to this Purpose 2 Cro. 582. Noy 20. 3 Cro. 791. were cited. Besides, the Court found in the Verdict is mentioned to be held bis per per Annum; whereas a Court-Baron is held from three Weeks to three Weeks, and 'tis found as a Court to which the Lord hath Title by Prescription; whereas a Court-Baron is of common Right, and it is a Fault in Pleading to prescribe for it. Noy 20.

But the Judgment was affirm'd by the Opinion of the whole Court; for first it was observed, that the Verdict hath expressly refer'd to the Abowry, for it finds that H. T. held by Service of Suit ad Cur. Manerii præd. bis per Ann. ad Manerium ill. tenend. prout in advocacione infrascript. interius mentionat; but if these Words prout in advocacione, &c. were not there, it would be good; for there is not such Variance as was supposed; for the Plea doth not mention before whom the Court was held, but leaves it at large, and the Verdict ascertains it, and there is not thereby any Variance; for a Court-Baron may be well held coram Seneschallo: And for this Holt C. J. cited 1 Leon. 316. and 2 Jo. 22, 23. and the Plea it self shews, that the Court was not a Court-Baron, according to general Usage, for it shews that it was to be held bis per Ann. Ex relatione alterius as to the Matters in B. R.

Note; As to the Objection made by Serjeant Gould, that no Seisin of the Manor was alledged in William Mohun: The following Precedents are according to the Cognizance in this Case, viz. Co. Entr. 597. D. Rast. Replev. in Hors de son fee. pl. 1. 4. 5. in Tenure 3. 4. 5. 7. and Winch 937,

\* This is Court in the Original, but the Sense requires it should be read Manor.

973. but in this last Precedent it is said, that Judgment was given for the Plaintiff; but this Case is reported in Winch 31. by the Name of Whitgift versus Sir F. Barington, and in Hutt. 50. by the Name of Whitgift versus Helderham, and in both those Books 'tis said, that Judgment was for the Abowant.

## MARRIAGE.

Harrison *versus* Cage & Ux'. Mich. 10 W. 3.

(1.)  
5 Mod. 411,  
412.  
Carthew 467.

**A**ction on the Case, wherein the Plaintiff declared, That in Consideration he the Plaintiff would marry the Defendant, the Defendant promised to marry him; and that he had offered himself to her, but she refused him, and had married the other Defendant: It was here insisted, that this Action did not lie; tho' it might be otherwise in the Case of a Woman, for Marriage is an Advancement to a Woman.

Lutw. 68, 78.  
1 Roll. Abr.  
22, 77.  
2 Bullst. 276.  
3 Bullst. 48.  
3 Cro. 323.  
Cart. 235.

Holt C. J. The Consideration of a Man's Promise, is the Woman's; then certainly his Promise shall be a good Consideration for her Promise; for there is the same Parity of Reason in the one Case as in the other: In the Ecclesiastical Court, the Plaintiff might have compelled a Performance of this Promise; but here indeed, she has disabled her self, for she has married another; though you might give in Evidence any lawful Impediment, as that the Parties were within the Levitical Degrees, &c. for that makes the Promise void; but 'tis not so of a Precontract. The Man is bound in Respect of her Promise; if she makes none, he is not obliged by his Promise, and then 'tis but nudum pactum: So that her Promise must be good, to make his signify any Thing to her; and then if her Promise be good, why should not a good Action lie upon it? The Action is grounded on the mutual Promises; therefore this is actionable on both Sides, or on neither Side. Judgment for the Plaintiff.



Hemming *versus* Price. Mich. 12 W. 3.

**S**HE was libell'd against in the Spiritual Court ex officio, for Adultery with one now dead; by whom she had Children living; and having pleaded below, that she was married to him, it was replied, that she had a former husband then living; and a Prohibition was moved for, suggesting the Matter of the Plea. And it was urged, that by Sentencing her, they would in Effect bastardise the Issue, which ought not to be after Death of one of the Parties.

Holt C. J. Do you think that if a Man and a Woman cohabit together, and have Issue, and one of them dies, that that shall protect the other from being proceeded against in the Spiritual Court for Fornication? and this shall not bastardise the Issue, for he was a Bastard without any Proceedings of theirs, if the Parents were never married. And the Meaning of the saying, that one shall not be bastardised after the Death of either of his Parents, is, that the Spiritual Court shall not proceed to dissolve a Marriage de facto after the Death of either Parties, as in Case of Consanguinity, Precontract, &c. but in this Case, if the Replication below be true, the Marriage was ipso facto void.

And per Cur' no Prohibition.

Jeffson *versus* Collins. Pasch. 2 Ann.

**M**otion for a Prohibition, to stay a Suit in the Spiritual Court upon a Contract of Marriage per verba de presenti; suggesting that the Contract was in Fact per verba de futuro; for which the Party had Remedy at Common Law.

Holt C. J. Tho' per verba de futuro, yet it is a matrimonial Matter, and the Spiritual Court hath Jurisdiction. A Contract per verba de presenti is a Marriage, viz. I marry you, you and I are Man and Wife; and this is not releasable. Per verba de futuro, I will marry you, I promise to marry you, &c. is releasable; therefore the Party may admit the Breach, and demand Satisfaction. He also said, he remembred this Case. Adumplit in Consideration that the Plaintiff promised to marry the Defendant, the Defen-

(2.)  
Cafes W. 3.  
432.

(3.)  
2 Salk. 437.  
S. C. 6 Mod.  
155.

Vide 3 Mod.  
165.  
5 Mod. 411.  
2 Lev. 15, 16.  
6 Mod. 155.  
3 Lev. 65.  
6 Mod. 172.  
1 Salk. 24, 25.  
Lutw. 68, 78,  
79.

See 2 Lev.  
15, 16. acc.

dant promised to marry him; it was proved, That there was a Promise; yet the Defendant producing a Sentence in the Spiritual Court in Disaffirmance of that Contract, it was held good counter Evidence, and the Plaintiff was nonsuit. A Prohibition was denied.

Hutton *versus* Mansell. Pasch. 3 Ann.

( 4. )  
Mod. Cases  
172.  
3 Salk. 16.

**I**N Action of the Case, laying mutual Promises of Marriage between Plaintiff and Defendant, and Breach in the Man, the Defendant; upon the Evidence, express Promise was proved on the Man, but none on the Side of the Woman.

By Holt C. J. If there be an express Promise by the Man, and it appears the Woman countenanced it, and by her Actions at that Time behaved her self so as if she consented and approved the Promise of the Man; tho' there be no actual Promise by her, that shall be sufficient Evidence that she likewise promised.

Collins *versus* Jessot. Pasch. 3 Ann.

( 5. )  
Mod. Cases  
155, 156.  
2 Salk. 437.

**A** Prohibition was moved for to the Spiritual Court, to stay a Suit there upon a Contract of Marriage per verba de presenti, suggesting that the Contract was in Fact per verba de futuro, for which the Party hath a Remedy at Common Law, if not performed.

Holt C. J. If a Marriage Contract be per verba de presenti, it amounts to an actual Marriage, which the very Parties themselves cannot dissolve by Release or other Agreement; for it is as much a Marriage in the Sight of God, as if it had been in Facie Ecclesiæ: With this Difference, that if they cohabit before Marriage in the Face of the Church, they are for that punishable by Ecclesiastical Censures; and if after this Contract, either of them lies with another, such Offender may be punished as an Adulterer: And if the Contract is per verba de futuro, and after either of the Parties so contracting, without a previous Discharge of the Contract, marries another Person, it will be good Cause of Dissolution of a second Marriage, and Decreeing the first Contract's being perfected into a Marriage. It was first held in my Lord Vaughan's Time, that an Action would lie at Law for Breach of such

Swinb. 210.  
Cro. Eliz. 79.  
2 Lev. 16.  
3 Lev. 65.  
Hob. 79.

an executoꝝy Contraſt; which was then greatly oppoſed, becauſe the Party had his Remedy in the Spiritual Court: But notwithstanding, it was reſolved the Party had his Election of either Remedy; and that by bringing Action at Common Law, the Remedy in the Spiritual Court was waived and releaſed; for now in Lieu of Performance of the Contraſt, he ſhall recover Damages. The Contraſt per verba de futuro, which doth not intimate an actual Marriage, but refers to a future Act, this is releaſable; and therefore, the Party may admit the Breach, and demand Satisfaction: And if a Man and Woman make mutual Promiſes of Intermarriage in futuro, and the Man gives the Woman 100 l. in Satisfaction of the Promiſe, and ſhe ſo accepts it, 'tis a good Diſcharge of the Contraſt. As to the Jurisdiction of the Spiritual Court, it is with Reſpect to the Nature of the Thing, viz. if it be matrimonial or teſtamentary; and if it appear by the Libel to be of that Nature, we will not prohibit them.

A Prohibition was denied.

*Wigmore's Caſe.* Mich. 5 Ann.

A Man contraſting Marriage was an Anabaptiſt, and had a Licence from the Biſhop to marry, but married his Wiſe according to the Forms of their own Religion. (6.) 2 Salk. 438.

Holt C. J. By the Canon Law, a Contraſt per verba de præſenti, as I take You to be my Wiſe, I marry You, or You and I are Man and Wiſe, is a Marriage: So of a Contraſt per verba de futuro, viz. I will take You to be my Wiſe, or I will marry You, &c. If the Contraſt be executed, and he does take her, 'tis a Marriage, and the Spiritual Court cannot puniſh for Fornication. Swinb. Cro. Eliz. 79.

But ſee here ſuch a Promiſe, if not in Writing, is void 3 Lev. 65. by the Statute 29 Car. 2.

In the Caſe of a Diſſenter, married to a Woman by a Miniſter of the Congregation, who was not in Orders; it is ſaid, that this Marriage was not a Nullity, becauſe by the Law of Nature the Contraſt is binding and ſufficient; for though the poſitive Law of Man ordains that Marriages ſhall be made by a Prieſt, that Law only makes this Marriage irregular, and not expreſſly void: But Marriages ought to be ſolemnized according to the Rites of Moor 169, 170.



of the Church of England, to intitule the Privileges attending legal Marriage, as Dower, Childs, &c.

## Master and Servant.

Aishcome *versus* Le Hundred de Spelholme.  
Pasch. 2 W. & M.

( 1. )  
Show. 94.

**U**Pon Evidence in Assumpsit for Wares sold, Holt C. J. That if a Man sends his Servant with Ready Money to buy Meat, &c. and the Servant buys upon Credit, the Master is not chargeable. But if a Servant usually buys for the Master upon Tick, and the Servant buy some Things without the Master's Order, yet if the Master were trusted by the Trader, the Master is chargeable.

— and Harrison. Mich. 11 W. 3.

( 2. )  
Cases W. 3.  
346.

**A**Servant had Power to draw Bills of Exchange in his Master's Name, and after is turned out of the Service.

Holt C. J. If he draws a Bill in so little Time after, that the World cannot take Notice of his being out of Service; or if he were a long Time out of his Service, but that kept so secret, that the World cannot take Notice of it, the Bill in those Cases shall bind the Master.

Rosiere *versus* Sawkins. Pasch. 12 W. 3.

( 3. )  
Cases W. 3.  
399.

**T**Respass by a Master for the Battery of the Servant, per quod Servitium, &c. Defendant pleads Actio non, because it did not appear that he was his Servant at the Time of the Battery committed; concluding with a Petit Judic. de Billa, & quod Billa cassetur; and whether this were made a Plea in Abatement by the Conclusion, was the Question.

Holt C. J. We must discourage these Sort of Pleas, and Billa and Nar' are the same Thing in this Court; and therefore one may demand Judgment de Billa, and alledge Insufficiency in the Declaration; and tho' such a Plea as this ought not to be received; yet since it has been received, there is no Harm to award a Respondeas ouster, for the Defendant cannot assign it for Error, because for his Advantage; and yet we may justify to give final Judgment: And so was the Rule.

Anonymus. Trin. 12 W. 3.

Holt C. J. **T** Rober lies for the Master, for a Ticket (4.) or other Writing, intitling his Appren- Cases W. 3. 415. tice to Honey earn'd by him during his Apprenticeship; but here the Crover was against the Executor of the Apprentice for a Ticket given out after Death of the Apprentice, for Honey earned by him during the Apprenticeship; and because it never was in the Apprentice's Possession, the Action was not maintainable; but after the Executor receives the Honey, the Master may have Assumpsit for so much Honey received to his Use.

*At Nisi prius coram Holt.* Mich. 13 W. 3.

**I** F a Servant usually employ'd to pawn Goods for his (5.) Master, or to borrow Money for him, borrow of me, or Cases W. 3. 564. pawn his Master's Goods with me for Money; I shall maintain Debt against the Master thereupon. 2dly, If my Servant has a Note for Money due to me, or other Goods, which in their Nature are not properly in the Custody of a Servant, that is Evidence prima facie, that he has an Authority from me to apply them to such use as he does after put them; but the contrary may be given in Evidence, as that he came by the Note by undue Means, or had it to another particular Purpose. 3dly, If a Man has a Bill of Exchange, he may authorise another to indorse his Name by Parol; and when that is done, it is the same as if he had done it himself. 4thly, If I pawn Goods to A. for such a Sum, A. may have Debt for the Money, notwithstanding his having a Pawn. Per Holt C. J.

Hern *versus* Nichols; coram Holt C. J. *At Nisi Prius.*

( 6. )  
1 Salk. 289.

Brook, Ac-  
tion sur le  
Case, pl. 8.  
con.

1 Salk. 272.

**C**ASE for a Deceit; the Plaintiff set forth, That he bought several Parcels of Silk for ——— Silk, whereas it was another kind of Silk, and that the Defendant well knowing this Deceit sold it him for ——— Silk. On Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant, but in his Factor beyond Sea; the Doubt was, If this Deceit could charge the Merchant.

Holt C. J. held the Merchant answerable for the Deceit of his Factor, tho' not criminaliter, yet civiliter; for it is more Reason, that he, that puts a Trust and Confidence in the Deceiver, should be a Loser, than a Stranger. And upon this Opinion the Plaintiff had a Verdict.

Thorold *versus* Smith. Pasch. 5 Ann.

( 7. )  
How far, and  
in what Cases  
a Banker's  
Note, tho'  
taken by a  
Servant, shall  
be Payment  
to his Master.

**T**HIS Case was this Day moved again by Serjeant Darnell, who argued, that if the Plaintiff had taken this Note himself, and given the Discharge, then clearly he must abide by it, but he thought that the Servant here having exceeded his Authority, that 'twas no Payment; to which the Court agreed; and now the Servant's giving a Discharge when he got no Payment, cannot bind his Master. A Goldsmith's Note may be kept three Days, and if he presents it the third Day, and 'tis not paid, he may return the same; but the Court seemed to think, that a Goldsmith's Note is always, in London, looked upon as Ready Money, but not Bills of Exchange, as Darnell said, viz. to be paid in three Days. The Case of Ward against Evans was agreed to be good Law, but did not affect this Case. The Court did agree, that a Goldsmith's Note is not Payment to the Plaintiff himself, unless he did give a Discharge for the Debt; and then it shall be intended, that he gave his Debt for that Goldsmith's Note, and so bought it; but the Doubt is, how far the Discharge of the Servant shall bind the Master; and most of the Justices inclined for the Defendant: And,

Powys J. said, That if A. usually receives the Rents of the Lord of a Manor, if one of the Tenants pay his Rent



to A. this is good Payment to the Lord; quod fuit concessum, per Holt C. J. But the Court was willing to hear Counsel, how far the Servant could bind his Master, Adjournatur.

Thorold *versus* Smith. Trin. 5 Ann.

( 8. )  
**T**his was again spoke to by Darnell and Eyre for the Plaintiff, and Sir James Montague and Dee for the Defendant; and they said for the Plaintiff, the Servant had but a bare Authority, which was to be pursued strictly; as if I impower one to make a Feoffment in Latin, and he makes the Indenture in English or French, 'tis not good, 10 H. 7. 9. b. which is stronger than our Case; so if I make a Letter of Attorney to you to make Livery to A. B. Chaplain, and you make Livery to A. B. and he is not Chaplain, this Authority is not well pursued, 4 H. 6. 1. b. So where a Letter of Attorney is made to deliver Seisin after the Death of the Feoffor; tho' such Livery of Seisin had been void, yet the Attorney cannot by that Warrant make Livery before the Feoffor's Death, 40 Ass. 38. 2 Roll. 9. S. 1. Here in our Case the Party or Servant had an Authority to receive Money; but he could not take a Horse, nor any other collateral Thing as a Horse; nor could he take a Bond; therefore, I suppose, he could not take Paper, because that thereby the original Contract was not destroyed. If a Merchant sends his Servant with a Bill of Exchange for Payment or Acceptance, and the Servant takes another Bill for it; this is not good, for which he quotes Maline de lege Mercatoria; now I do not take it the Servant shall bind the Master, when he had no Authority, as 'tis found, to give such Receipts: 'Tis not found that he used to receive such Bills, so as to make it our Act by Implication; nor does it appear that the Plaintiff knew that his Servant had taken Johnson's Note; so that there is no Agreement subsequent, either express or implied; if we had disagreed, or liked it, yet we had no Time, because we got the Note on Saturday in the Afternoon, and since that Night Johnson never appeared.

'Twas answered for the Defendant, That Goldsmiths Notes are looked upon in London to be the same Thing as Ready Money; and as to the Cases cited by the other Side, they are not much to the Purpose; our Ancestors were

were not so conversant in Bills of Exchange and Goldsmiths Notes as we are; I do not believe that they will say, that in the Dealing of Merchants, that Servants are to bring Letters of Attorney from their Masters to receive Money or Bills; for in Way of Dealing they are authorised for both. The Note, in our Case, was not imposed upon him, he might have either at his Election; and surely the Servant's Act in this Case, being the common Way of Trade, should sooner prejudice his Master, than us who never employed him; besides, this Servant did commonly receive Money for his Master; for this was a Case made and reserved at the Trial, to have the Opinion of the Court therein, therefore not to be taken as strictly as a Special Verdict; quod fuit concessum per Holt C. J. And 'tis certain, said they, this Servant did often receive Notes and Money for the Plaintiff, and that his Master consented thereto; and if his Master had seen this Bill when his Servant took it, he would have been satisfied therewith; and, I believe, no Man doubts, but the Plaintiff and every Merchant in London would accept of Johnson's Note, at the Time the Servant took the same; but,

Darnell replied, that the most they can say is, that the Servant might give a Receipt for the Bill, but not for the Money.

Holt C. J. I do agree, when one has an Authority to receive Money, he cannot take any Thing else, and the Cases 10 H. 6. 1. b. 40 Aff. 38. are good Law; but we must here consider, that this is by Way of Trade here in London, and that it is usual here for Merchants Servants to take Goldsmiths Notes, and to give their Receipts as for Money, especially being such as the Merchant himself, and every other Merchant in London would take, and I should take his Receipt to be good. Powys and Gold ad idem.

Powell J. said, That the Authorities cited by Darnell were good, and that Authorities are strictly to be taken, and that no new Practices can alter the Law, for that is only to be changed by Act of Parliament; the Authority of a Servant of a General Receiver, who is to transact all Things for his Master, does not extend so far as that they can take any Thing but Money; and 'twould be mischievous to put Masters so far into the Power of the Servant. I do not doubt, but the Servant, in our Case, had often received Money and Notes for his Master, and gave Re-

ceipts for the same; and I am apt to believe, I should have done the same Thing he did. But I do not take this to be Matter of Law, but Matter only of Evidence, Whether this be good Payment; to which Holt and the Court agreed, and so a new Trial was awarded. There was a Case cited here by Holt, which was ruled upon Evidence between Delvo and Grevill.

## M E R C H A N T S.

Du Costa *and* Cole. Trin. 1 W. & M.

**C**ole drew a Bill of Exchange upon Sir Nathan Rowland and Company in Oporto, for 1000 Mille Rees, upon the 6th of August, payable thirty Days after Sight, and upon the 14th of August the King of Portugal had lessened the Value of the Mille Rees 20l. per Cent. so that it was impossible to have Notice. The Bill was presented for Acceptance, with the Advance of 20l. per Cent. Rowland was ready to accept and pay at the current Value, but not with the Advance; and therefore there was a Protest for Non-acceptance; and an Action was brought against the Drawer. (1.) Skinn. 272.

Ruled by Holt C. J. That there not being Notice, the Bill ought to be paid according to the ancient Value; for, the King of Portugal may not alter the Property of a Subject of England: And therefore this Case differs from the Case of mixed Monies in Davis's Reports; for there the Alteration was by the King of England, who has such a Prerogative, and this shall bind his own Subjects. In this Case he also held the Protest to be an Evidence *prima facie*, that the Bill was not accepted; and sufficient to put the Proof on the other Side.

Jefferies *versus* Legendra. Mich. 3 W. & M.

**N**ARR. on Case, Upon a Policy of Assurance on a Ship called the Olive-Branch, from London to Naples; and sets forth the Policy in hæc verba, by which the Ship was (2.) 1 Show. 320.



warranted to depart with Convoy; and avers, that being laden departed from London towards Naples, cum & sub præsidio navis guerrinæ; That afterwards she was taken at Sea, and lost. Non Assumpsit pleaded.

Jury finds, That the Defendant signed the Policy prout; that the Ship departed with Convoy; that the Ship was separated from the Convoy, by Strels of Weather in the Downs; that she was driven into Foy; that she (waiting for Convoy) did afterwards go out, expecting to meet the Convoy, supposed to be coming from Torbay; that the Wind was fair, that the Convoy was not come up; that she could not return, that she sailed on; that afterwards, ten Leagues off she was taken by a French Man of War.

Holt C. J. Denied the Case of Hind and Knightley to be Law; that 'twas Part of the Agreement, and if not fulfilled, did vitiate the Policy. But he said, that Decessit only signifies a Departure from London in that Voyage; and suppose he does depart, and is at Sea, the Voyage is begun: If the Separation had been by Fraud, 'twere somewhat; but here the Separation is by Strels of Weather. Suppose the Master had committed Barretry, the Insurers are liable; if you intend he should go the Voyage with Convoy, you must make the Agreement so.

Gregory: There is no Manner of Fault in the Plaintiff; when the Vessel was once gone to Sea with Convoy, 'twas not in the Plaintiff's Power to do more.

Eyres: I take it, the Meaning is, That she should go out with Convoy, and so continue with him to the End of the Voyage, without any Default in him; and the Special Verdict hath found no Default in him. Judgment pro Quer', Dolben absente sic consentiente.

Wynne *versus* Fellowes. Mich. 3 W. & M

( 3. )  
1 Show. 334.

NARR. en dett sur Charter partie, by the Plaintiff as Executor of Wynne the Master, in which the Defendant and other Freightors covenant, that the Ship should go and return home within twelve Months, periculis marium exceptis, and the Master warrants, that the Ship at her Departure should be strong, well, and sufficiently furnished with a Boat and Necessaries, and mann'd with himself, and eight Men and a Boy; which, or as many as should be necessary, should at all Times convenient be ready to serve with the Boat during the Voyage; and the Plaintiff

Plaintiff and the Defendant each bind themselves in 1000*l.* to the other, for Performance.

The Plaintiff assigns for Breach, that the Ship departed from the Thames, &c. That the Master died in the Voyage at six Months end, and that it did not return within the twelve Months, tho' the Dangers of the Seas did not hinder, &c.

The Defendant pleads, that the Ship was, at her Departure, mann'd with the Master, seven Men, and a Boy, and that the Ship sailed to Madeira, the Canaries and Jamaica, and she being there, six of the Seamen in the same Vessel at her Departure, left the Service of the said Ship, and that the Master did not provide other Seaman to serve in the said Vessel and Voyage, and that ob defectum inde, she lay six Months at Jamaica, and could not return infra 12 Menses; Et hoc paratus est verificare. Plaintiff demurs.

Holt C. J. Took Exception to the Plea, that it did not allege that they had done their Part; that they had loaded the Ship, or discharged her at Jamaica, or that they had dismissed her, and given Orders for her Sailing; and her Demurrage there was upon Occasion of Want of Seamen, and cited 3 Cro. 194. and Fitz. tit. Debt; and at last Judgment was given for the Plaintiff, upon this Reason per tot. Cur'.

Hereford *and* Powell. Mich. 7 W. 3.

**I**T was ruled by Holt C. J. That where a Factor at the Canaries deserves Money for Factorage, he cannot bring an Action for his Factorage, unless the Principal refuse to come to Account; and if it appears that the Factor hath Money in his Hands, he may detain, and cannot bring an Action for his Factorage; but if he were directed to vest all the Produce of the Adventure in Wines, (as here) then he may bring an Action for his Factorage and Pains, because he cannot detain, and hath no other Remedy. Quod nota. (4.) Com. 349.

Mikes *versus* Caly. Pasch. 12 W. 3.

**I**N Case, the Plaintiff declared, that he was possessed of a Ship ready for a Voyage to America, lying in the Harbour of B. and was ready to set Sail the first fair Wind; that the Defendant entered upon his Possession, and (5.) Cases W. 3. 381, &c.

and distrained the Corn with which the Ship was freighted, whereby he lost his Voyage, to his Damage, &c.

Plea was, that the said B. is an antient Borough for several Hundred Years by such a Name, and after incorporated by Letters Patent by another Name; that Time out of Mind there was an antient Court in the Borough for Administration of Justice, &c. That the Corporation, Time whereof, &c. used to repair and maintain the Court-house at their Charge; and in Consideration thereof they had Time, &c. so much a Sack for all Corn that was sold in that Borough, (in the Name of Toll,) by any, not Inhabitant, or free of the Corporation. That the Corn in the Plaintiff's Ship was bought by Persons not Inhabitants, &c. and put on board without paying Toll, and a Prescription for Distraining in Case of Refusal was laid; that the Defendant was Bailiff appointed by the Town as their Bailiff by Writing under their Common Seal; and upon Demand and Refusal distrained the Corn for the Use of the Corporation. Plea was agreed to be bad, chiefly for that it was not laid, that it was a Corporation Time out of Mind. 1 Inst. 114.

Per Cur': Plaintiff had Judgment; and per Holt C. J. The Master of a Ship is in many Respects liable, and may sue in Things concerning the Ship, as well as the Owner: And the Defendant might have Title to the Goods by Sale, or Consignment by the Owners, but that ought to have been pleaded; and what the Master recovers in this Action is to the Use of the Owners. And the Master may bring an Action against any Merchant for Freight in his own Name; but quatenus Master, he cannot bring Trover for the Ship, but he may have Case, if by a Seizure of the Ship he be hindered of his Voyage, as here; and what is taken from him in Relation to the Ship, he shall have Case or Trespas for it, at his Election, with this Difference, that if he bring Trespas he must declare upon his Possession. Et per totam Cur' Jud' pro Quer'.

Trin. 12 W. 3.  
Cases W. 3.  
408, &c.

Holt C. J. If a Ship goes Freight of an outward Voyage, the Seamen shall have their whole Wages out; but if at their Return the Ship be taken, or other Mischiefs happen, whereby the Voyage homeward is lost, they shall have but half Wages for the Time they were in Harbour abroad.



Bates *versus* Grabham & al', December 3, 1703,  
Coram Holt C. J. at Nisi Prius.

CASE, on a Policy of Insurance. The Case was, *H.* (6.)  
Crisp being at the West-Indies, sent a Letter to Bates <sup>2 Salk. 444,</sup>  
to ensure Goods on the Mary Galley, Captain A. Hill Com- <sup>445.</sup>  
mander, at London. Bates carried the Letter to Stubbs,  
who writ Policies, and he by Mistake made the Insurance  
on the Mary, Captain Haslewood Commander, &c. the De-  
fendant subscribed this Policy. The Mary Galley was lost,  
and then Stubbs applied to the Insurers to consent to alter  
the Policy; to which they agreed, and the Mistake was  
mended. It was objected at the Trial, that the Mary was  
a stouter Ship than the Mary Galley, and that the Insurers  
ought to have an Increase of Premium for the Alteration.

But Holt C. J. held, that the Action well lay, and that  
the Mistake might be set right, and that Stubbs was a good  
Witness; and he cited this Case, which happened when  
Pemberton was Chief Justice; An Insurance was made from  
Archangel to the Downs, and from the Downs to Leghorn,  
but there was a Parol Agreement at the same Time, that  
the Policy should not commence 'till the Ship came to such  
a Place; and it was held, that the Parol Agreement should  
avoid the Writing.

Bond *versus* Gonfales. February 14, 1704.

CASE upon a Policy, to insure the William Galley  
from Bremen to London, warranted to depart with Con- (7.)  
voy. The Galley set sail from Bremen, under Convoy of a <sup>2 Salk. 445.</sup>  
Dutch Man of War to the Elb, where they were joined by  
two other Dutch Men of War; thence they sailed to the Texel,  
where they found a Squadron of English Men of War, and  
an Admiral; after a Stay of nine Weeks, they set out  
from the Texel. The Galley was separated in a Storm,  
and taken by a French Privateer, taken again by a Dutch  
Privateer, and paid 80 l. Salvage.

And by Holt C. J. ruled, that the Voyage ought to be  
according to Usage; and that their going to the Elb, though  
in fact out of the Way, was no Deviation; for 'till after  
the Year 1703, there was no Convoy for Ships directly from  
Bremen to London.

The Plaintiff had a Verdict.

Grave *versus* Sir Charles Hedges. Mich. 5 Ann.

(8.)  
A Ship that was sent to Sea by a Sentence in the Admiralty, and lost, if the Part-owners that were against sending out the Ship should be allowed to sue in the Admiralty.

**T**here were several Part-owners of a Ship, and most of them were agreed and desirous to send the Ship upon a Voyage, but two or three of the Part-owners would not consent to it, therefore these who were for sending out the Ship did sue in the Admiralty to compel those who were unwilling, being the smallest or fewest in Number, to agree and consent to the Voyage; which Sort of Suit is very usual in that Court. And in the Admiralty they made a Sentence whereby they were forced to consent, but did also cause the Part-owners who were for the Voyage, to give an Instrument of Assurance for the safe Return of the Ship from the Voyage, to the dissenting Part-owners, which, it seems, is the common Course on these Occasions. It happened that the Ship was lost in the Voyage, and the Part-owners, who had the Assurance, sued in the Admiralty Court upon it, and had a Sentence there, and were to have Execution: And now a Motion was made for a Prohibition to the Court of Admiralty, for that this was a Contract or Assurance made upon Land, whereof the Admiralty Court can have no Conulance by the Statute of R. 2.

Holt C. J. It is very hard that we should interpose, when you were the Persons that forced these People to consent to send out this Ship, and made use of this Course for your Turn; and now you would avoid the Proceedings.

Powell J. The Statute is strong, and we will hear Civilians in it.

Grave *versus* Sir Charles Hedges. Pasch. 6 Ann.

(9.) **N**OTE, that this Case was this Day moved again; and it appeared there was no Sentence in the Court of Admiralty given against the Plaintiff, only a Citation, which is in the Nature of a mean Process here; therefore the Court in this Case did agree, that they might proceed below to Sentence, but to stay Execution till the Matter was determined in this Court, and let the Defendant shew Cause the Beginning of next Term why a Prohibition should not be granted.

Grave *versus* Sir Charles Hedges.

**T**HIS Case was moved again, and argued by Dr. Lane, for a Consultation, and he said, the Statutes 13 R. 2. 5. and 15 R. 2. 3. were only to controul the great Jurisdiction which the Admiralty usurped, and to restore the same according to the Laws of Oleron, which were the same with the Rhodian and Roman Laws. These Bonds are as good as those the Admiralty takes from Privateers; and these Statutes meant no more, than that we should not meddle with Common Law Matters; we may, notwithstanding those Statutes, take Bonds for any Thing touching Maritime Affairs; and we can arrest a Ship no where but in a River, which is *infra corpus comitatus*. This is very beneficial for Navigation, and is the usual Way. If the Majority of the Part-owners agree to send a Ship on a Voyage, and the Rest disagree, unless their Reasons be good, of which the Court of Admiralty is Judge, then, if the Ship goes out against the Consent of two or three of the Part-owners, those that dissent are to have no Profit of the Voyage; but if the Ship be lost, then those that sent her are to pay those that disagree for their Loss.

(10.)

Holt C. J. Declare in a Week on the Prohibition, and the Matter shall be heard on Demurrer.

Mishomer. See Name.

## M O N E Y.

Dixon *versus* Willoughs. Mich. 8 W. 3.

**C**ASE upon four several Promises; Verdict for the Plaintiff, and entire Damages. It was moved in Arrest of Judgment, that one of the Promises was ill laid, viz. that whereas the Defendant was indebted to him in 13 l. 10 s. for nine Guineas he promised to pay, &c. and says not nine Guineas *ad valorem*, &c. as he ought, the Value being not ascertained by Proclamation. Per Holt C. J.

(1.)  
2 Salk. 446.



Latch. 84.

Yelv. 80, 135.

Poph. 28.

Cro. Car.

515.

Palm. 407.

5 Mod. 6, 7.

Lutw. 487.

488.

1 Salk. 9, 22,

25.

Comb. 327.

Comb. 387.

S. C.

1st, Any Piece of Money coined at the Mint, is of Value as it bears a Proportion to other Current Money, and that without Proclamation.

2dly, There are Guineas of 40 s. a-piece, and so we will intend these were, and that the Plaintiff was satisfied the Rest.

3dly, That it was not necessary to set forth the Number of Guineas, for in an Indebitatus Assumpsit the Consideration is only set forth, to shew it was not a Debt by Bond, &c.

### Gregg's Case. Pasch. 5 Ann.

(2.)  
2 Salk. 596,  
597.

**A**N Action was brought by an Executor for Money due to his Testator, and it was moved to bring so much Money into Court, but denied.

And Holt C. J. said, In an Action brought by one who is Administrator, the Defendant cannot bring Money into Court, because the Administrator is not by Law to pay Costs. In a Quantum meruit, bringing Money into the Court has been refused; and at another Time allowed: In Replevin, the Defendant avows for Rent, and the Plaintiff was admitted to bring it into Court. And in Debt for Rent, it was moved to bring so much into Court.

But Holt C. J. thought it hard, and said he remembred the Beginning of these Motions, the first was to bring in Principal and Interest upon a Bond; after that it came to an Indebitatus Assumpsit: It has been done in Action of Debt for Rent, but not so freely; we do it in Ejectment on a Special Reason, viz. because that Action subsists entirely upon the Rules of the Court. In Debt upon Bond, the Defendant must bring in the whole Penalty, or the Court will not stay Proceedings.

See the Case of St. Leiger versus Pope, under Title Pleadings.

Mod. Caf.

25, 101, 153.

# MONOPOLIES.

Nightingale & al' *versus* Bridges. Hill. I W. & M.

**T**Rover and Conversion de bonis & catallis sequent', (1.) viz. de una Nave, vocat' The James Frigat, one-  
ris cent' & trigint' doliorum, decem bombardis, anglice Guns, cum omnibus armament' apparat', tormentis', velis, funibus, munitionibus, provisionibus, scloppis, cymbis, & aliis supeditamentis eidem navi spectan' sive pertinen', ac etiam ducent' & duodecim ponder' librat' cibi vocat', &c. Non cul' pleaded.

The Jury find that Car. 2. by Letters Patent, anno regni sui 24, to the Royal African Company (being a Body Corporate) did grant to them all the Regions, Countries, &c. beginning at the Port of Sally in South-Barbary inclusive, and extending from thence to Cape de bona Esperanza inclusive, with all the Islands near adjoining to those Coasts, &c. and all Ports, Harbours, &c. to hold to them and their Successors, from the making of the said Letters Patent for the Term of 1000 Years, and grants Licence to them and no others, to send Ships, &c. and to have all Mines of Gold and Silver there, &c. and the whole and only Liberty of Trade there; any Law or Statute to the contrary notwithstanding; and none other of his Majesty's Subjects to frequent or trade in those Places, &c. prohibiting any to Trade there, unless by Licence, under Pain of our Indignation, and Imprisonment of their Bodies during our Pleasure, and the Forfeiture and Loss both of Ships and Goods, &c. with Power to enter, search and seize Ships and Goods, &c. one Society of the Forfeiture to the King, the other to the Company; it also creates a Court of Judicature, to have Consuance and Power to hear and determine all Cases of Forfeiture and Seizure for trading thither. The Jury find further, 4 September 1684, the Company granted a Commission under their Seal to one John Lallal, reciting the Grants and Powers of their said Charter, to command him Captain of the Orange-Tree Frigat, and all subordinate Officers and Seamen, to seize all Ships trading, &c. and whatsoever they take in their outward bound Voyage, they are to carry to Land safe, and there

to deliver them to the Agent and Council of Factors, there to be proceeded against in the Court of Admiralty there established. That John Bridges the Defendant was one of the Officers in the Ship called the Orange-Tree at the Time of setting out, and at the Time of making the said Commission. That the 28 February 1693, the Company made another Commission to Henry Nurse, James Huler, W. S. and R. W. or any two of them, reciting the Power of their Charter, did constitute and appoint them Judges of the Admiralty there, and to execute those Powers according to such Instructions as they should send. That John Lastall, before taking of the Plaintiff's Ship, died, that John Bridges after his Death was Commander of the Orange-Tree Frigate; that the Plaintiff being Owner of the Ship and Goods in the Declaration, did trade in an infidel Country, in and with these Ships and Goods, to certain Places within the Limits of that Company; that John Bridges did seize and carry away the Plaintiff's Ship upon the high Sea, in his outward bound Voyage, and afterwards carried them to the Fort of Land Corfe in Africa aforesaid, against the Will of the Plaintiff, and the Master and Seamen. That at the Defendant's Instance there was a Process in the said Admiralty Court against the said Ship; that none appearing for her, there was a Condemnation, &c. Sed utrum the Defendant be guilty, ignorant, &c. Et si, &c. pro quer', Damages to 4300l. and Costs to 2 l. 3 s. 4 d. & si pro Defend', &c.

Judgment for the Plaintiff by the whole Court. The Defendant had no Counsel to argue the Special Verdict, though it was obtained by the great Importunity of the King's Counsel on his Behalf.

*Sands versus Child and Lynch.* Pasch. 5 W. & M.

(2.)  
Skin. 334,  
361.

**E**Rror upon a Judgment in an Action upon the Case upon the Statute R. 2. for a Prosecution in the Court of Admiralty, &c. and a Special Verdict was found, That Sands the Plaintiff, among others, had freighted a Ship for a Voyage to Maderas, and from thence to the East-Indies, to a Place within the Patent granted to the East-India Company; and upon this the Defendants complained to the King and Council; and upon this there is a Prosecution in the Admiralty Court at the Instance of the Defendants, in behalf of the Company; and there the Ship is put under an Embargo, and detained 'till the Plaintiff would give

Security



Security not to go to any Place within the Patent to the East-India Company. They found Child to be President of the Company, and Lynch a Solicitor or Attorney for the Company; and that Sands by Reason of this Prosecution had lost his Voyage, to his Damage of 20,000 l. and Judgment in C. B. was given for the Plaintiff. Upon Error brought in B. R. the Question is, if, upon this whole Matter, any Cause of Action upon the Statute appears against the Defendants?

In another Term. Holt C. J. delivered the Resolution of the Court in this Case, and said, that there not being any Difficulty in the Case, they would not argue it, but they were all of Opinion that the Judgment ought to be affirmed; for he said, that though the Suit in the Admiralty was not against the Person, yet being against his Goods, according to the Course of Proceedings there, this is a Suit in the Admiralty within the Statute. Secondly, That though the Defendant be not the Party in Court, yet if he be the Person who moves the Suit, and be the Cause of such Charge and Trouble, an Action lies against him. But the main Difficulty of the Case was, because the Plaintiff was a Tenant in Common of these Goods, and of the Ship, with other Persons; and that they being a Thing personal, they ought all to join; and of such Opinion was the whole Court: But he said, that this was but in Abatement, and nothing appears within the Record which abates the Plaintiff; and if it had been pleaded, he ought to have averred, Quod tempore captionis, and of the Action brought, the other Tenants in Common who ought to join were alive; for, if it does not appear they were alive at the Time of the Action brought, the Plaintiff alone might have the Action by Survivorship.

Skin. 361.

The Judgment was affirmed.

### Edgeberry *versus* Stephens.

THE Lord Coke says, that a Monopoly, which is an Allowance by the King's Grant to any Person for the Sole Buying or Selling of any Thing, restraining all others of that Liberty, which they had before the making of such a Grant, is against the ancient and fundamental Rights of this Kingdom, and void by the Common Law.

- (3.)  
 3 Mod. 131.  
 2 Salk. 447.  
 3 Inst. 181.  
 Vaugh. 345.  
 3 Lev. 351.  
 2 Jon. 53.

But

But per Holt C. J. and Pollexfen, A Grant of a Monopoly may be to the first Inventor of a Thing, by the Stat. 21 Jac. 1. and if the Invention is new in England, a Patent may be granted for it, though the Thing was practised beyond Sea before; for the Statute speaks of new Manufactures within this Realm, so that if they be new here, it is within the Act: And the Statute intended to encourage new Discoveries useful to the Kingdom, whether learned and acquired by Study or Travel.

2 Salk. 445.  
Dyer 279.

A Merchant includes all Sorts of Traders, as well as Merchant-Adventurers. By Holt C. J. And we take Notice of the Laws of Merchants that are general, and not of particular Usages.

## M O N T H.

Woodward *and* Hamersley. Pasch. 4 W. & M.

Skin. 313.

**T**HE Question was upon the Statute of 1 W. & M. which appoints all Bishops, &c. to take the Oath directed by that Act before the first of August, otherwise to be suspended; and if they did not take them within six Months, to be accounted from the said first Day of August, then to be deprived ipso facto, &c. A Ban presents to the Church of Burton Dasslet in the County of Warwick, at the Expiration of six Months, but before the Expiration of six Calendar Months; so if the six Months in the Statute were to be accounted Calendar Months, the Church was plena & consulta, &c. If the six Months are to be accounted according to four Weeks to the Month, then the Church was void by the Statute, because the Incumbent had not taken the Oaths.

Powis J. Insisted on Catesby's Case in the sixth Report, and the Rule there taken, that where the Subject Matter of the Month concerns an Ecclesiastical Person, the Computation shall be according to their common Understanding, which is according to the Calendar.

But by Holt C. J. & Curiam, absente Gregory; Catesby's Case is not to the Purpose; for the Question there was upon a Deposition and Lapse; and this was a Matter

constituted by the Canon Law, and received by the Common Law, and being received by our Law, it ought to be received according to the Construction of their Law. But in our Case, we are upon the Construction of an Act of Parliament, which ought to be construed according to our Law. And as to Sir Thomas Powis's Argument, that the Matter concerns Ecclesiastical Persons, and so the Construction ought to be according to their Law, Holt C. J. said, within the Act there is another Clause for Fellows of Colleges, the which are not Ecclesiastical Persons, and shall the six Months accounted for them within this Clause be Lunar Months, and by the other Clause Kalendar Months? *Res. Curia advisari vult.* But they seemed ripe to give Judgment that the six Months shall be accounted Lunar Months; and they doubted, *scil.* Dolben and Eyres, of Copley and Collins's Case.

And Holt C. J. said, that this Case alone stuck with him; and notwithstanding, he inclined *fortiter ut supra.*

## M O R T G A G E.

Andrew Newport's Case. Pasch. 6 W. & M.

A Mortgage made by Kendall 1659, by divers mean Assignments vested in Newport, Executor of Secretary Coventry. It was objected, first, that it does not appear that any Money was paid upon the original Mortgage, and therefore it was fraudulent; and it being fraudulent in the Creation, though Secretary Coventry paid a valuable Consideration, yet this will not purge the Fraud, and make it good against the Defendant, who was a Purchaser *bona fide*, and for a valuable Consideration. *Non allocatur;* (1.) *Skin. 423.*

For Holt C. J. said, the first Mortgage was good between the Parties, and being so, when the first Mortgagee assigns for a valuable Consideration, this is all one as if the first Mortgage had been upon a valuable Consideration; for now the second Mortgagee stands in his Place, and therefore is in the Proviso of the Statute 27 Eliz. cap. 4. That no Mortgage *bona fide*, and upon good Consideration, shall be impeached by Force of this Act, but it



shall stand in such Force as before the Act made; and if this Proviso does not extend to the Case, to what Case shall it extend?

Smartle *versus* Williams. Pasch. 6 W. & M.

(2.)  
1 Salk. 245,  
246  
3 Lev. 387.

**U**PON a Trial in Ejectment it appeared, that a Man made a Mortgage for Years to A. who without the Mortgagee's joining assigned it to B. and he assigned to C. under whom the Plaintiff claimed: And Exception was taken, that though the first Mortgagee might assign without making any Entry, or joining the Mortgagee, who is but Tenant at Will to the Mortgagee, and his Possession, as such, is but the Possession of the Mortgagee; yet the Assignment of the first Mortgagee determined the Lease at Will, and the Mortgagee thereby became Tenant at Sufferance, and his Continuance in Possession, on Ejectment brought, divested the Term, and turned it to a Right; so that it could not be again assignable, without B.'s Entry on the Mortgagee's joining therein.

Co. Lit. 56,  
57.

Holt C. J. On executing the Deed of Mortgage, the Mortgagee, by the Covenant to enjoy till Default of Payment, is Tenant at Will, and the Assignments of the Mortgagees make him but Tenant at Sufferance; but his continuing in Possession could never make a Disseisin, nor Divesting of the Term: It would be otherwise if the Mortgagee had died, and his Heir entered, for the Heir is not Tenant at Will, but his first Entry was tortious; or if the Mortgagee had entered upon the Mortgagee, and he had re-entered, because the Mortgagee's Entry would have been a Determination of the Will, and the Re-entry of the Mortgagee had been a merely tortious Entry. And as to bringing an Ejectment, that cannot admit an actual Divesting, so as to turn the Term to a Right; for that was not brought to recover the Mortgage-Term, but the Possession only, and for the Recovery of which the Assignee of the first Mortgage had no other Remedy at Law: And here the Entry laid in the Declaration, or confessed by the Defendant, is not an Entry that is real; for it shall neither avoid a Fine, nor be sufficient Evidence to maintain Trespasses.

See Ejectment and Estoppels.

# M O T I O N.

Anonymus. Hill. 11 W. 3.

**I**N an Action of Debt upon a Bond, the Defendant says it was per Dureſs; that will not excuſe him from Special Bail; for the Court will not determine the Merits upon Motion, nor put a Slur upon the Plaintiff's Cauſe, which ought to come to Trial without Prejudice. So if he ſays it was uſurious. Per Holt C. J. 1 Salk. 99,  
100.

# M U R D E R.

Trial of Lord Mohun, 31 January 4 W. & M.

**T**HE Lords propoſed ſeven Queſtions to the Judges, which were answered by them. (1.)  
State Trials.

1. In Caſe a Man ſhall murder another, whether all thoſe in his Company at the Time of the Murder, are ſo neceſſarily involved in the ſame Crime, that they may not be ſeparated from the Crime of the ſaid Perſon, ſo as in ſome Caſes to be found guilty only of Manſlaughter?

Ans. The Crime of thoſe who are in the Company at the Time of the Murder committed, may be ſo ſeparated from the Crime of the Perſon that committeth the Murder, as in ſome Caſes they are only to be found guilty of Manſlaughter.

2. A. conſcious of an Animosity between B. and C. A. accompanyeth B. where C. happens to come, and B. kills him, whether A. without any Malice to C. or any actual Hand in his Death, be guilty of Murder?

Ans. A. is not guilty of Murder; for it appears the Meeting was caſual, and there was no Deſign in A. againſt C. and therefore though A. did know of the Malice between B. and C. yet it was not unlawful for A. to keep Company with B. but he might go with him any where, if it was not upon

upon a Design against C. And therefore as the Case was put, there was not any Offence in A.

3. Whether if A. heard B. threaten to kill C. and some Days after A. shall be with B. upon some other Design, where C. shall pass by, or come into the Place where A. and B. are, and C. shall be killed by B. A. standing by, without contributing to the Fact, his Sword not being drawn, nor any Malice ever appearing on A.'s Part against C. whether A. will be guilty of the Murder of C.?

Ans. A. in this Case would not be guilty either of Murder or Manslaughter.

4. Whether a Person, knowing of the Design of another to lie in wait to assault a third Man, who happens to be killed (when the Person who knew of the Design is present) be guilty of the same Crime with the Party who had the Design, and killed him, though he had no actual Hand in his Death?

Ans. This is neither Murder nor Manslaughter. But if he, that knew of the Design, had advised it, or agreed to it, or lay in wait for it, or resolved to meet the third Person with him that killed him, it would have been Murder.

5. Whether a Person, knowing of the Design of another to lie in wait to assault a third Person, and accompanying him in that Design, if it shall happen that the third Person be killed at that Time, in the Presence of him who knew of that Design, and accompanied the other in it, be guilty in Law of the same Crime with the Party who had that Design, and killed him, though he had no actual Hand in his Death?

Ans. If a Person is privy to a felonious Design, or to a Design of committing any personal Violence, and accompanieth the Party in putting that Design in Execution, though he may think it will not extend so far as Death, but only Beating, and hath no personal Hand, or doth otherwise contribute to it than by his being with the other Person, when he executeth his Design of assaulting the Party, if the Party dieth, they are both guilty of Murder. For by his accompanying him in the Design, he shews his Approbation of it, and gives the Party more Courage to put it in Execution; which is an Aiding, Abetting, Assisting and Comforting of him, as laid in the Indictment.

6. If a Person be present named William, when Thomas said he would stab John, upon which William said, he would stand by his Friend, and afterwards Thomas doth actually murder John, and William is present at the Murder; whether



ther the Law will make William equally guilty with Thomas?  
Or what Crime is William guilty of?

This is rather a Case of Fact than Law. For if William was designedly present with the other that committed the Murder, then it would be Murder in William. And if there was no Evidence to prove upon what Account he was present, it might be presumed he was present in Pursuance of his former Agreement: But if it appeared he did not meet in Pursuance of that Agreement, then it might not be Murder. That this was all Matter of Evidence, and rested upon the Consciences of those that were to try the Prisoner.

7. If A. accompanieth B. in an unlawful Action, in which C. is not concerned, and C. happeneth to come in the Way of B. after the first Action is wholly over, and happeneth to be killed by B. without the Assistance of A. whether A. is guilty of that Man's Murder?

Ans. As this Case is stated, A. is not guilty of Murder.

Keat's Case. Mich. 8 W. 3.

ON two Indiaments preferred against Keat, one for (2.) Murder at Common Law, and the other on the Statute of Stabbing; two Special Verdicts were found to the same Effect, That Keat having an Intent to turn his Man Wells away, sent to him to bring his Key, and that he refused to do it; upon which Keat fetched his Sword, and went into the Kitchen and expostulated with Wells, who thereon said to him, that he might have the Key if he would; then Keat struck Wells with his Sword, and he having a Sneed, or Handle of a Scythe, in his hand, struck at Keat therewith, but did not hurt him; and after this, Wells followed Keat from the Chimney towards the Kitchen Door, and punched him with the Sneed several Times, and then Keat thrust Wells with his Sword, and killed him. Upon these Special Verdicts, two Questions in Law were made; If it be Murder, or Manslaughter at Common Law? Or, if not Murder by the Common Law, if it be Manslaughter within the Statute of Stabbing, and by this the Party excluded his Clergy? And it was objected, the Verdict had not ascertained the Fact, but that it might be intended the Striking by Wells and by Keat was all at the same Time.

H. P. C. 47,  
49, 50.  
Kel. 89, 58,  
129.

1 Jac. 1. c. 8.

Holt C. J. The Relation of the Batter found by the Verdict is certain enough, as it happened and succeeded the one Part to the other, in Point of Law; and as to the Question, whether it be Murder or not, it is plain that this is Murder at Common Law, and the Denial of the Key was no sufficient Provocation to extenuate the Act to Manslaughter: Where the Law adjudges an Act to be Murder, it is for the Cruelty of the Fact; and here, there not being a just Cause for the first Stroke, if the Batter had killed Wells with that, it would have been Murder; and so it also now is, though afterwards the other punched his Batter, and then he is killed. If a Man assaults another, and the other turns again, and beats him who made the first Assault, so that he is forced to fly to the Wall, and there he kills the other in his own Defence, nevertheless it is Murder: And in this Case, if the Servant had not been killed, but had survived the Quarrel, and brought Action of Trespass against his Batter for the Beating, would the Denial of the Key have been a good Justification for striking him with his Sword in this Manner? In Grey's Case, where a Smith struck his Apprentice with a Bar of Iron, it was adjudged Murder; for though Parents and Masters have a Power of Correction, this ought to be with such fitting Instruments as are proper for it; and if they correct with a Sword, Club, or other such like Instrument, from which Death might probably ensue, it would be Murder. And as for Turner's Case, who killed his Foot-boy with a Clog, it was such a light thin Thing, that when it was produced, it was a Wonder to every one such a Mis-adventure could ensue from so slight a Cause. Then as to the other Point of Question, if it be within the Statute of Stabbing, I think that it is not; for I take it clearly, that a Sneed is a Weapon drawn within the Meaning of this Statute: And the Words in the Statute, viz. That hath not then first stricken the Party which shall so stab or thrust, are not to be understood of the first Stroke generally given, but of the killing of another, before the Party killed had struck at all; for the Intent of the Act was to prevent sudden Stabbing, before a Man had an Opportunity for his Defence, formerly much used; and where he might defend and make Resistance by striking, it is not within the Statute.

Rokeby J. was not satisfied with the finding of the Verdict; and therefore no Judgment was given.

Stout *versus* Foler. Pasch. 12 W. 3.

SPencer Cowper Farrister at Law, Justice of Peace, and Captain of the Militia, and one Mason and Rogers, (3.)  
Cases W 3.  
372, &c. having been indicted and acquitted in August before, at Hertford Assizes, of the Murder of S. Stout a Quaker Woman, an Appeal was brought within the Year, by an Infant twelve Years old only, next Heir to the Deceased, but not mentioned in the Writ to be an Infant, and delivered to the Under-Sheriff Foler's Clerk, in Foler's Absence; the Appellant after Teste, and before the Return of the Writ, chose the Deceased's Mother for his Guardian, before Holt C. J. in his Chambers, and she was then and there accordingly admitted. After the Writ returnable, the Mother of the Appellant, at the Instance and Procurement of Cowper, comes and demands the Writ of the Under-Sheriff, who, without any Assurance that the Infant was the Appellant, or that the Party who came with him was his Mother, delivers the Writ to them, who destroy it. All this appearing to the Court by the Sheriff's own Confession, and he being put to answer Interrogatories, confessing further, that he, upon Receipt of the Writ, had sent a Copy of it to Cowper the Defendant's Brother, and likewise Notice to Cowper the Defendant.

He was judged in Contempt by Holt C. J. and Gould against Turton, and fined 200 Marks. Note; In this Case the Year having expired, they petitioned the Lord Keeper for a new Writ; who assembled Treby C. J. of the Common Pleas, Sir John Trevor Master of the Rolls, and Justice Powell, to advise of it; who all agreed it was discretionary to grant one or not; but agreed it was not proper to do it; Some, especially Treby C. J. alledging for Reason, that an Appeal was a revengeful odious Prosecution, and therefore deserved no Encouragement.

On which Occasion Holt C. J. with great Vehemence and Zeal said, that he wondered that any Englishman should brand an Appeal with the Name of an odious Prosecution; that for his Part, he looked upon it to be a noble Prosecution, and a true Badge of English Liberties; and referred to the Statute of Gloucester, and the Comment thereupon in 2 Inst.



The Queen *versus* Wallis. Anno 1703, 2 Ann.

(4.)  
1 Salk. 334,  
335.

**A**N Indictment against A. for the Murder of John Cooper, and against the Defendant and others, as Persons present, assisting, aiding and abetting him therein: The Defendant pleaded Not Guilty; and it appeared upon the Evidence, that the Person killed was a Constable, and in the Execution of his Office, with divers other Constables; and that the Defendant first drew his Sword, and with many others fell upon the Constables; that this Affray continued an Hour, 'till in the End Cooper was slain, but by whose Hand was unknown: Also that A. had been tried on this Indictment, and acquitted.

4 Rep. 43.  
3 Inst. 51.  
Kel. 60.

Holt C. J. Although the Indictment be against the Prisoner for aiding, assisting and abetting A. who was acquitted, yet the Trial is well enough; for here who actually did the Murder is not material; the Matter is, that a Murder was committed, and the other is but a Circumstance, and all are principal Murderers in this Case: Therefore if a Murder be proved, it is sufficient. If a Man begins a Riot, and the same continues, and an Officer is killed, he that began the Riot, as the Defendant here did, is a principal Murderer, though he did not do the Fact which caused the Death.

In Mawgridge's Case. Hill. 5 Ann.

(5.)  
Kel. 121,  
134, 135,  
136, 137.

2 Roll. 420.  
1 Hawk. 135.

**H**olt C. J. **W**H<sup>o</sup> gave the Opinion of the Judges, said that the Distinction between Murder and Manslaughter, only is occasioned by the Statute of 23 H. 8. and other Statutes, that took away the Benefit of Clergy from Murder committed upon Malice prepensed. If a Man, upon a sudden Disappointment by another, shall resort violently to that other Person's House, and with his Sword endeavour to force his Entrance, to compel him to perform his Promise, or otherwise to comply with his Desire; and the Owner shall set himself in Opposition to him, and he shall make a Pass at and kill the Owner of the House, it is Murder. But if one Man upon angry Words shall assault another Person, either by pulling him by the Nose, or striking upon the Forehead, and he that is so assaulted shall draw his Sword, and immediately run the other through, that

that is but Manslaughter; for the Peace is broken by the Person killed, and he that was so affronted might justly apprehend, that one who treated him in that Manner might have some further Design against him. And where a Man was indebted, B. and C. came to his Chamber upon Account of his Creditor, to demand the Money, and there B. took a Sword that hung up and was in the Scabbard, and stood at the Door with it in his hand undrawn, to keep the Debtor in until they could send for a Bailiff to arrest him; thereupon the Debtor took out a Dagger which he had in his Pocket, and stabbed B. this was adjudged only Manslaughter; for here the Debtor was insulted, and imprisoned injuriously, without any Process at Law; and though it be within the Words of the Statute of Stabbing, yet it is not within the Reason of it. A Man perceives another by Force to be injuriously treated, pressed, and restrained of his Liberty, though the Person abused doth not complain, or call for Aid or Assistance; and others out of Compassion shall come to his Rescue, and kill any of those that shall so restrain him, that is Manslaughter only; because when the Liberty of one Subject is invaded, it affects all the Rest, and is a Provocation to all People: But some Judges were of Opinion, it was Murder, for meddling in a Matter in which they were not concerned. Where a Man is taken in Adultery with another Man's Wife, if the Husband shall stab the Adulterer, or knock out his Brains, this is bare Manslaughter; for Adultery is the highest Invasion of Property, and there cannot be a greater Provocation: And Jealousy is the Rage of a Man. If a Thief comes to rob another, and he kills him, it is not Murder, but a lawful Act.

Stiles 467.

H. P. C. 57.  
Plowd. 101.

1 Sid. 160.

1 Vent. 159.  
Raym. 213.

### The Case of the Reforming Constables. Mich. 8 Ann.

Holt C. J. **T**HIS stands for the Resolution of the Court. (6.)

It is an Indictment for Murder, found the Sessions before last Easter-Term, for the Murder of John Dent.

Jeremiah Tooley was indicted for doing the Act, and the other two as Aiders, for that they made an Assault upon John Dent, and with Malice prepense did kill and murder him.

The Indictment being found at Hicks's-Hall, they were delivered over at Newgate, and at the Old-Bailey were arraigned; to which Indictment they pleaded Not Guilty, upon which a Special Verdict was found.

The Jury find a Statute made the 27 Eliz. for the good Government of London and Westminster, and for the Reformation of several Disorders there, which doth enact, that the Dean, High Steward, &c. of Westminster, or his Substitute, or two Capital Burgeſſes, whereof the Dean, &c. must be one, shall have Power to punish Incontinencies within the City and Liberties of Westminster, according to the Custom of London.

And then they find that there is a Custom in London to punish all Incontinencies, &c. and that in the City of London there is an ancient Custom, that every Constable appointed for any Parish within the City, hath Power to exercise his Authority throughout the whole City; and then they find, that upon the 8th Day of March in the 8th Year of the Queen, the Commissioners, according to the Authority given them by the Statute for recruiting the Army, did issue out their Warrant to the Constable of St. Margaret's Westminster, to press several Persons for the Queen's Service, and that the Warrant was delivered to Samuel Bray, Constable of St. Margaret's, to be executed; and that he in order to execute his Warrant, went into the Parish of St. Paul Covent Garden, to take several to assist him therein; and then they find, that St. Paul's Covent Garden hath a Constable of its own; and then they find, that the 8th of March in the 8th of the Queen, the said Samuel Bray being in St. Paul's Covent-Garden, did remain there to execute the said Warrant; and that Anne Dekins was in the Street, between the Play-house and the Rose-Tavern, whom Samuel Bray did know and believe to be a disorderly Woman; and that he did then and there take her into his Custody, with an Intent to carry her to the Round-house; and that the said Bray had formerly taken her up; and then they find, that the said Anne Dekins, the said 8th of March, did not all that Day misbehave herself; and that Bray had not any Warrant to take her up.

And then they find, that Jeremiah Tooley, Archer and Dawson, did meet the said Bray with the said Woman in his Custody, in another Place in St. Paul's Covent Garden; and that the three Prisoners were Strangers to the said Anne Dekins, and unknown to her; and that they, to deliver the said Anne Dekins out of Bray's Custody, assaulted Bray



with their Swords drawn; and that the same Samuel Bray shewed them his Constable's Staff, saying he was concerned in the Queen's Business; upon which they put up their Swords, and then Bray carried her to the Round-house. And then they find, that a little Time after, the said Tooley, Archer and Dawson, did again draw their Swords, and assault Bray, to cause the said Anne Dekins to be discharged; upon which Samuel Bray called several to assist him to keep her in Custody; upon which John Dent did strike; and they find, that in the Fray Jeremiah Tooley gave Dent one mortal Wound, of which he died. The Question is, whether this is Murder, or Manslaughter only?

Holt C. J. This Case has been much considered by the Judges of England, and the greater Part are of Opinion that this is but Manslaughter; but the other five, viz. Trevor C. J. Blencow, Tracy and Dormer, Justices of the Common Pleas, and Ward Chief Baron of the Exchequer, that this is wilful Murder.

But myself, and my Brothers Powell, Powis and Gould, Justices of the Queen's Bench, and Bury, Price and Lovell, Barons of the Exchequer, that this is Manslaughter only.

I think it necessary to give an Account of the Reasons of our Opinions, and shall first shew the Reasons of us who hold it is Manslaughter only.

The first Reason that we go upon is, that this was a sudden Action, and that it was not done with an intended Malice; but the Design was to hinder this Woman's being imprisoned, and after she was imprisoned, to deliver her out of Custody: It is plain that there is no precedent Malice, but the Matter was sudden, and nothing can be inferred to prove Malice prepenſe, because it was to rescue the Woman from her Imprisonment, which Imprisonment will appear not to be lawful. If she was wrongfully imprisoned, then there was no Wrong done in them to endeavour to rescue her. 4 Co. 40. b. Young's Case. 9 Co. 65. Mackally's Case; in both these it is said, that if a Constable is killed in executing his Office, that is Murder; but why? because he was doing his Duty, which was necessary. But if he is not in Execution of his Office, but doing an Act of Presumption, yet because he is a Constable, will you say that must be Murder? No, it is not so when he is out of the Execution of his Office, and doing what is contrary to his Duty. For it is not only necessary, that a Constable should be in the Execution of his Office, and those who assist him, but it is also necessary that the Party that cometh to

3 Inst. 53.

H. P. C. 45.

to part them have some Notice that he aſſs as a Conſtable; and ſo it is adjudged in Keyling 66. *Thomſon's Caſe*.

It is fit for a Conſtable to part an Affray, and keep the Peace; and if he comes and bids them give over in the Queen's Name, and then he is killed, that is Murder; but if he comes and falls in amongſt them, and doth not give that Intimation, or if he ſay nothing, then it is but Banſlaughter.

The next Queſtion is, whether Bray was in the Execution of his Office? for if he was not, then Dent had nothing to do there; and this depends upon the Verdict as it is found.

We all agree that the Statute found in the Verdict doth not enlarge the Power of Conſtables, or make them to be otherwiſe than they would have been if the Statute had not been made. One of the five which differed from us did ſay, (which I confeſs I do not well underſtand) that Bray was Conſtable de facto; and I have ſince asked him what he meant by it? and he told me, it was the Executing the Authority as Conſtable made him Conſtable de facto. I agree that the Verdict has found an Uſage Time out of Mind in the City of London, for the Conſtable of one Pariſh to execute his Authority in another, but there is no Title found to make Bray Conſtable in Covent-Garden de facto; for that is impoſſible; for it is particularly found, that the Pariſh of Covent-Garden have a Conſtable of their own. If a Conſtable of one Pariſh have not an Authority to execute a Proceſs out of his Liberty, then Bray, though a good Conſtable in Weſtminſter, hath nothing to do in Covent-Garden; for it is as though he was not Conſtable any where: It may be as well ſaid, that a Conſtable in the City may execute his Office at Kenſington.

But ſuppoſe that he was a Conſtable in Covent-Garden, and he ſeeing this Woman, whom he had formerly taken into his Cuſtody, and conſidering the Place where ſhe was, takes her up as a diſorderly Perſon; whether the Conſtable can do that? I think he cannot; and that by ſuch Taking he aſſs not as Conſtable, but as an Oppreſſor. A Conſtable, that aſſs out of the Limits of his Jurisdiction, and out of his Office, muſt be taken as an Oppreſſor. And ſo much the other five agree, that the Conſtable did aſſ without any Authority in taking up this Woman; he took her up for a diſorderly Perſon, but though he took her in Cuſtody before as an ill Perſon, yet it is expreſſly found, that this Day ſhe

she had done no Crime; and he took her up then, because he had taken her up before.

It is not a Constable's suspecting a Man to do an evil Thing, that will entitle him to take him up, but there must be some Fact done; as if there is a Felony committed, any Person then may suspect another, and take him up, but then he must shew in certain some Cause of Suspicion, and that Cause is traversable, and shall be determined on an Action of false Imprisonment. 2 Inst. 52. It is a hard Case if the Liberty of the Subject shall depend upon the good Opinion of the Constable. At the Trial, when it was put upon him, he could not give any Reason why he took this Woman up, but only because he had taken her up before. Do you think that it is fit that a Subject of England should be taken up in this Manner? So that now the Question is, whether they had not a sufficient Provocation? I take it they had. If a Man is oppressed by an Officer of Justice, under a mere Pretence of an Authority, that is a Provocation to all the People of England. Cro. Jac. 296. which is also in 12 Co. 87. the Case was this; Two Boys combating together, the one was scratched in his Face, and his Nose voided a great Quantity of Blood, and in that Plight he ran three Quarters of a Mile to his Father, who seeing his Son abused, and the Blood run from him, and his Clothes and Face all bloody, he took in his Hand a Cudgel, and ran three Quarters of a Mile, where the other Boy was, and struck him upon the Head, upon which he died; and this was held but Manslaughter.

And in 12 Co. there is likewise this Case: Several Men were at Bowls together, and two of them fell out, and quarrelled the one with the other, and a third Man who was by (who had not any Quarrel) in Revenge of his Friend, took up one of the Bowls, and struck the other with it, of which he died; there it was adjudged but Manslaughter, because it happened upon a sudden Motion, in Revenge of his Friend. Much more in this Case, where the Liberty of the Subject is invaded, under the Pretence of an Authority. Though he was a Constable, yet he exceeded his Power.

There was a Case quoted which was 13 H. 7. pl. 10. In Crespals of Assault and Battery and Imprisonment at Dale; the Defendant said that A. held a House in the same Vill of Dale, and entertained suspicious People, and that the Plaintiff oftentimes resorted to the same House suspiciously with Women of evil Fame, by which B. Constable of



the same Vill, came to the Defendant, and prayed him to assist him in arresting the Plaintiff, to find Surety for his good Behaviour; upon which the Defendant came with the said B. at the Hour of twelve at Night, and him found suspiciously at the same Place, and there took him, and kept him in Custody; which is the same Assault, &c. for which the Plaintiff has brought this Action; and this was held to be a good Justification. This Case is good Law; for he was a Person of Authority, and here the Batter was committed in his own View. A Constable may arrest a Man that breaks the Peace in his View, but if it be done out of his View, he cannot. He cannot take a Bond for the Breach of the Peace, if it is not broken in his View. 3 Cro. 375.

As to the Batter of lewd Women, I know not why they take the Liberty to lay Hands upon them as they are walking, when they see nothing, but only suspect them to be lewd and disorderly. It is true, there is an Authority by the Statute of Jac. to send them to the House of Correction, but not without Warrant, which Bray wanted in this Case: And the Constable is to bring them before a Justice of the Peace, and not immediately to take them to Prison, as Bray did here, and so make himself a Judge.

I will now consider why the other five differed from us. Four of them agree that he had not any Authority; but one of them is of Opinion, that when Bray the Constable spoke to them, and said he was concerned in the Queen's Business, and shewed them his Staff, they ought to have desisted. But I never knew that a Constable's Staff had so much Efficacy, when the Constable himself had no Authority, and when he was in the Wrong.

Of the other four that differ from us, two of them hold, that though this was a wrongful Act, yet it was not a Provocation to these Soldiers, because they were Strangers. They agree, that if they had been Relations, Servants, or Friends, that might be a Provocation; but here they being Strangers, it was not, for they had nothing to do in the Matter. A Servant for a Master, a Friend for a Friend, a Relation for a Relation, is allowed to have a sufficient Provocation. I would fain know, when a Man is concerned for the Laws of the Land, and for Magna Charta, whether that is not a Provocation? If you will look into 10 Co. the Case of the Barthal, you will find that any Man that usurps upon a Jurisdiction, and oppresseth a Man, he is an Offender against Magna Charta. Now here is an

Murpation upon a Jurisdiction, because Bray took this Woman up upon a bare Suspicion that she was lewd; and is not that against Magna Charta?

We take it that we have a larger Authority for us. 18 Car. 2. Hopkin Hugget's Case, in Keyling 59. upon a Special Verdict, as here, which found, That John Berry, and two others with him, had de facto, but without a Warrant, impressed a Man whose Name was unknown, to serve in the Dutch Wars; that thereupon the Man unknown being impressed, he with the said John Berry and two others, went to Cloth-Fair; and the said Hopkin Hugget and three others, walking in Smithfield, and seeing Berry and the two others, with the Man impressed, going into Cloth-Fair, instantly pursued them, and over-took Berry and the other two, with the pressed Man, and requiring to see their Warrant, Berry shewed Hopkin Hugget a Paper, which he said was no Warrant; and immediately Hopkin Hugget drew his Sword to rescue the Man impressed, and thrust at Berry, upon which Berry and the two others drew their Swords, and they fought; whereupon Hopkin Hugget gave a Wound to Berry, whereof he immediately died: And this was held but Manslaughter. And it is there judged, that if a Man is arrested, or restrained from his Liberty, although he is quiet himself, yet it is a Provocation to all the People of England, not only his Friends, but Strangers, for common Humanity's Sake, to endeavour his Rescue; and if in such an Endeavour to rescue, they kill one, this is not Murder, but Manslaughter only.

This Case was as ours is, a Special Verdict, which came before all the Judges, and there four of the Judges held it to be wilful Murder, for the same Reasons as four of these do now; but the other eight held it to be but Manslaughter; because the Subject is wrongfully restrained of his Liberty, and there is a Provocation to all Men to endeavour his Assistance: Where there is a Violence used to restrain a Man from his Liberty, that can be but Manslaughter. And those four who differed, gave Judgment according to the Opinion of the eight, and allowed him his Clergy.

Now, how doth that Case differ from this? They say there was a Fighting by the Press-Master; but doth that make an Alteration? No, it is the wrongful Imprisonment that makes the Alteration, if any there be. If a Man without any Provocation draw his Sword upon another, and then the other draw his Sword, and is killed, that is Murder,

Murder, as was the Resolution in the Lord Morley's Case, Kelyng 53.

They say it could not be a Provocation to the Prisoners, because they knew not that she was illegally arrested. But surely, a Man must not lose his Life for his Ignorance, when he happens to be in the Right. Cro. Car. 271. Sir H. Ferrar was arrested by a Warrant that named him Knight, whereas he was a Baronet; his Servant kills the Bailiff; this was adjudged Manslaughter only, because the Warrant was ill.

I am as much for a Reformation as any one: But in a legal Way, for,

— Vir bonus est quis?

Qui consulta Patrum, Qui leges, Juraque servat.  
It was adjudged only Manslaughter.

## N A M E.

Holman *versus* Walden. Hill. 2 Ann.

( 1. )  
1 Salk. 6.  
Mod. Cases  
115.

**I**N Action of the Case against the Defendant B. W. he pleaded in Abatement, that he was baptized by the Name of John, & per nomen & cognomen de J. W. always was known and called; without that, that he was called or known by the Name and Surname of B. W. On a Demurrer, it was insisted, that the material Part of the Plea was the Name of Baptism, and he could not have another Name; therefore the Traverse was needless and frivolous.

1 Inst. 3.  
Cro. Jac. 558.  
Cro. Eliz.  
897.  
2 Roll. 135.  
2 Brownl. 48.  
6 Rep. 53.  
1 Show. 298.

Holt C. J. One may have a Nomen & Cognomen that never was baptized; and a Person may be baptized by the Name of A. and confirmed by the Name of B. as Sir Francis Gawdy was, not that I think the first Name ceased: And I think it would not be a sufficient Answer for the Defendant to say, he was baptized by the Name of J. unless he averred also, that he was ever called and known by that Name. But supposing it had been an Answer sufficient without more; yet saying he was baptized, &c. was only an Inducement, which is waved by the Traverse; and then the Effect of the Plea is, that he was never called by the

Name



Name of B. W. And here the Traverse is material, and likewise the Inducement.

Judgment to Answer over.

Lepara *versus* Sir John Germaine. Pasch. 2 Ann.

**I**N Assumpsit, the Plaintiff sued the Defendant by the Name of J. G. Knight; to which he pleaded, that he was a Knight and Baronet; and the Question was, Whether Baronet was a necessary Part of his Name, to support the Action? (2.) 3 Salk. 235, 236.

Holt C. J. The title Baronet is an essential Part of a Man's Name, because 'tis a Dignity, and whether it be created by Act of Parliament or Letters Patent, 'tis Part of his Name; as in Case of a Duke, Marquis, Viscount or Baron: Though as to this last Name, there is a Difference between a Baron by Tenure, and by Patent; for in the first Case, Baron is not a Name of Dignity, but the Baron by Letters Patent is a Dignity, and Part of his Name. 1 Lill. 34. 2 Inst. 669.

The King *versus* Bishop of Chester & al'.

**T**HE Defendant in a Quare Impedit, pleaded a Grant made to W. T. Armigero, postea Militi, who granted it to him; on Oyer of the Grant, it appeared to be to Sir W. T. Knight: Plaintiff demurred; and one Judge was of Opinion, it might be the same Person, for he might have such a Name by Reputation. (3.) 3 Salk. 236.

By Holt C. J. A Grant to W. T. Esq; by the Name of W. T. Knt. cannot be good, because Knight is a Name of Dignity, and as much his Name as the Name of Baptism; and if he might have such a reputative Name, he ought to have pleaded it so: But Knight, which is a Title conferred by the King, cannot be a Name in Reputation, for there is no Foundation for it.

Uide Additions.

## Ne exeat Regnum.

Nailor's Case. Mich. 13 W. 3.

Cases W. 3.  
562, &c.

**H**E was a Prisoner in the Counter for Want of Bail, and a Ne exeat Regnum directed out of Chancery to the Sheriff of London, to hold him to Security not to leave the Kingdom without Licence; and a Habeas Corpus being moved for, in order to charge him with an Action in this Court; Brotherick objected, that he could not be turn'd over to the Marshal, for then the Sheriff of London could not obey the Mandate of the Ne exeat Regnum, viz. to detain in Custody till he found Sureties, &c. The Sheriff, upon Default of Sureties, is to carry him to the common Gaol, there to be safely kept till he voluntarily give Security; and this is to be certified by the Sheriff into Chancery.

Holt C. J. Suppose he had been in the Sheriff's Custody, by a Writ of this Court, at the Time of the Ne exeat Regnum coming to him, as you would have it, he cannot be removed out of his Custody; so that the Writ would be a Kind of a Sanctuary to him. It is true, if the Sheriff take the Security, he ought to certify it into Chancery; and it is true, it is out of the Sheriff's Power, by the Removal, to detain him, or take Security; but we may keep him in our Custody till he find Security, and so there will be no Mischief.

Farriss. 9.

Holt C. J. The Writ of Ne exeat Regnum ought not to be granted, but upon great Reason and Examination; otherwise a Homine replegiando may lie. As Merchant Strangers may be prohibited from coming into England, by the same Reason the King's Subjects may be restrained from going out of the Kingdom; and for that Purpose this Writ of Ne exeat Regnum was framed, which is grounded upon the Common Law, and not given by any particular Statute. And here it is said, that the Writ Ne exeat regno is rarely had, and that on particular Reasons, and for particular Purposes, to prohibit a single Person from departing the Kingdom; and not a great many Men going a Voyage, &c. for which an Embargo is more proper. A Ne exeat Regnum was granted to stay the De-

fendant

pendant from going to Scotland; for tho' that is not out of the Kingdom, yet it is out of the Reach of the Process of our Courts, and within the same Mischief. <sup>2 Salk. 702.</sup>  
<sup>2 Inst. 54.</sup>

N E G R O E S.

Smith *versus* Browne and Cooper.

**I**N an Indebitatus Assumpsit the Plaintiff declared for <sup>2 Salk. 666.</sup>  
<sup>20 l.</sup> for a Negro sold to the Defendant, in the Parish of the Blessed Mary of the Arches, in the Ward of Cheap: There was a Verdict for the Plaintiff, and Motion in Arrest of Judgment.

Holt C. J. As soon as a Negro comes into England, he becomes free; and one may be a Villein in England, but not a Slave: You should have averred in the Declaration, that the Sale of the Negro was in Virginia, and by the Laws of that Country Negroes are saleable; for the Laws of England do not extend to Virginia, and we cannot take Notice of their Law but as set forth: Therefore he ordered the Plaintiff should amend and alter his Declaration, that the Defendant was indebted to him so much, for a Negro sold here at London, but that the said Negro, at the Time of the Sale, was in Virginia; and that Negroes by the Laws and Statutes of Virginia may be sold as Chattels. <sup>2 Vent. 4.</sup>  
<sup>3 Mod. 161.</sup>

Powel J. In a Villein the Owner has a Property, but 'tis an Inheritance; the Law takes no Notice of a Negro.



## N I S I P R I U S.

Bullock *versus* Parsons. Pasch. 4 Ann.

2 Salk. 454.

**I**N Debt. After Verdict for the Plaintiff, Mr. Eyre moved in Arrest of Judgment, that the Distringas was with a Blank, and Debiti (the Cause of Action) omitted, so it was a Distringas in another Cause. On the other Side it was urged to be as no Distringas, and aided by Verdict; and that it was amendable. Hob. 246. 2 Cro. 528. The Court made two Questions: 1st, Whether the Judge of Nisi prius had Authority to try this Issue.

2 Salk. 456.  
Raym. 38,  
73.

Et per Holt C. J. His Authority is not by the Distringas, but by the Commission of Assize; for the 13 E. 1. c. 30. gives the Trial by Nisi prius before Justices of Assize; at first these Trials were had upon the Venire facias; and the Clause of Nisi prius is by the 13 E. 1. c. 30. ordered to be inserted in the Venire. These Trials continued to be upon the Venire till 42 E. 3. c. 11. which requires, that the Names of the Jurors be first returned into Court. By this At two Inconveniencies were remedied. 1st, The Party might be prepared to make his Challenges: And, 2dly, The Defendant was prevented by this Means to cast an Essoin at Nisi prius, which was used frequently before. 3dly, The Court held no Distringas, or the Want of a Distringas, to be aided by a Verdict; but an ill Distringas was not: And remembered a Case wherein Saunders, of Counsel at the Bar, dropped the Distringas out of his Hand, that he might Want a Distringas, which would be aided, and not keep and shew an ill one, which would be naught. Also they held it amendable, and gave Judgment pro Quer.

# Nolle prosequi.

Goddard *versus* Smith. Mich. 3 Ann.

**A**ction of the Case for indicting him maliciously of Mod. Cases ..  
 Barretry, setting forth, that he was debito 261, 262.  
 modo inde Exonerat'; and at the Trial, to prove  
 it, he produced a Nolle ulterius prosequi by the  
 Attorney General.

Holt C. J. I doubt whether this Evidence will maintain the Declaration; for the Entering a Non Prof. is only putting the Defendant Sine die, and so far from discharging him of the Offence, that it doth not discharge any further Prosecution upon that very Indictment; but notwithstanding new Process may be made out upon it: A Nolle prosequi cannot be pleaded to a new Indictment for the same Crime; and it would be unreasonable to allow a Man that gets off by a Nolle Prof. to maintain an Action for a malicious Prosecution. And he said, he had known it thought very hard, that the Attorney General should enter a Nolle prosequi upon Indictments, and that it began first to be practised in the latter End of King Charles the Second's Reign; but that on Informations it had been frequently done.

Harcourt, Master of the Office, upon Search of Precedents; there never has been any Proceedings after a Nolle prosequi.

But per Cur': The Action doth not lie.

Non Compos. See Infants.

## N O T I C E.

Lane and Tenoe. Mich. 5 W. &amp; M.

Skinn. 362. Per Holt C. J. **I**N a Plea upon the Ass of Discharge of poor Prisoners, the Ass required, that Notice be given to the Creditors, &c. that he intends to take Benefit of the Ass, and that he shall be discharged against such Creditors to whom he gave Notice; but he said, it is not sufficient in his Plea to say, that he had given Notice to the Plaintiff in the Action in which he pleads such Plea; but he ought, according to the Ass Car. 2. to aver, that he had given Notice to the Party at whose Suit he was committed, tho' he be not Plaintiff; for this is expressly required by the said Ass.

Hill. 8 W. 3.  
Cases W. 3.  
111.

Holt C. J. If you have not regular Notice of Trial, yet if you make Defence, and do not depend on that, you cannot after take Advantage of it.

## N U S A N C E.

Arnold *versus* Jefferson. Mich. 9 W. 3.

( 1. )  
3 Salk. 247,  
248.

It was held by Holt C. J. **I**N this Case, that an Assise of Nuisance, or Quod permittat, &c. Quare erexit quædam Edificia is good, for there may be a Building without a proper Name. One who had an House and Lights Come out of Hind, the Neighbour and Owner of the next Field built a Shed, which stopped the Lights, and then he made a Lease thereof to another, against whom the Plaintiff brought an Action for this Nuisance: And adjudg'd, that altho' he might have Assise against the Builder, yet he cannot have an Action against his Lessee, because it would be

1 Mod. 54.  
1 Roll. Rep.  
22.



Waste in him to pull down the Shed; but the Plaintiff may stand on his own Ground and abate the Nuisance. And if a Man have a Way over the Land of another Person, and he stops that Way, and then demises the Ground; Action lies against the Lessee, for continuing this Nuisance.

Though Stopping of Lights is a Nuisance, the Stopping a Prospect is not.

*At Nisi prius coram Holt C. 7. Anonymus.*  
Mich. 11 W. 3.

ONE was indicted for a Nuisance, for keeping several (2.) Barrels of Gun-powder in a House in Brentford Cafes W. 3. 342. Town, sometimes two Days, sometimes a Week, till he could conveniently send them to London.

Holt C. J. To support this Indictment, there must be apparent Danger, or Mischief already done. 2dly, Tho' the Defendant had done thus for fifty or sixty Years, yet if it be a Nuisance, Time will not make it lawful. 3dly, If at the Time of setting up this House in which the Gun-powder is kept, there had been no Houses near enough to be prejudiced by it, but some were built since, it would be at the Peril of the Builder. 4thly, Tho' Gun-powder be a necessary Thing, and for Defence of the Kingdom, yet if it be kept in a Place dangerous to the Inhabitants or Passengers, it will be a Nuisance.

The King *versus* Wharton & al'. Pasch. 13 W. 3.

Indictment for Riot, the Cause of the Riot was the (3.) Right of a private River. Cafes W. 3. 510.

Holt C. J. If a River runs contiguously between the Land of two Persons, each of them is Owner of that Part of the River which is next his Land of common Right; and may let it to the other, or to a Stranger. 2dly, If one sees his Neighbour creating a Thing which will be a Nuisance, he cannot abate it till it become an actual Nuisance; so the Maxim of *præstat cautela quam medela* holds not in this Case. 3dly, If one has a River, and for Want of Securing it the neighbouring Land is overflowed, he is indictable for it.

Roswell *versus* Prior. Mich. 13 W. 3.

( 4. )  
Mod. Cases  
116.

**A**ction on the Case, for Stopping the Plaintiff's Lights; and the Plaintiff declared, that he was possessed of such a Messuage, for a certain Term of Years, and had and ought to have such Lights thereunto: It was a Question, whether this was good, without saying antient Lights.

1 Mod. 55.  
Hob. 131.  
2 Lev. 194.  
1 Vent. 274.

Holt C. J. Where a Man has a vacant Piece of Ground, and builds a House thereon, which has very good Lights, and he lets this House to another; if afterwards he build upon a contiguous Piece of Land, or lets the Land to one who builds thereupon, to the Nuisance of the Lights of the first House; the Lessee upon the first Lease shall have his Action of the Case against such Builder, &c. for the House was granted to him with all the Easements and Advantages then belonging to it: And it was agreed, that formerly the Way was to declare of antient Lights, and antient Messuage; but now that Course was altered.

2 Salk. 459.

This was after Verdict for the Plaintiff, on a Motion in Arrest of Judgment; and Salkeld says, the Court seemed to think this Declaration would not have been good upon a Demurrer.

Tenant *versus* Goldwin. Mich. 3 Ann.

( 5. )  
1 Salk. 360.  
1 Salk. 21.  
Mod. Cases  
311.

**I**N Case, The Plaintiff declared, That he was possessed of a Messuage, and in a Cellar, Part thereof, was wont to lay Coals, Beer, &c. That the Cellar joined to the Defendant's Messuage, and by a Wall, which the Defendant debuit reparare, was separated, and defended from the Defendant's Privy; and that for Want of Repairing, foeditates & sordida foricæ prædict. in Cellarium ipsius quer. fluebant, &c. There was a Judgment by Default, and Damages upon the Writ of Inquiry.

By the Chief Justice and Cur', Judgment for the Plaintiff.

Nat. Brev.  
127.  
9 Co. Ale-  
red's Case.  
Poph. 170.  
Hutt. 136.  
1 Sid. 167.

Holt C. J. It is the Defendant's Wall, and the Defendant's Filth, and he is bound of common Right to keep his Wall, so as his Filth may not damnify his Neighbour; it is a Trespass on his Neighbour; as if his Beasts should escape, or one should make a great Heap on the Border of his

his Ground, and it should tumble and roul down upon his Neighbours. The Case may be such, that the Defendant may not be bound to repair; but then upon the Words debet reparare he must be acquitted upon the Trial. If A. has two Houses, and the House of Office of one is contiguous to the Cellar of the other, but defended by a Wall, and he sells this House with the House of Office; the Vendee must repair the Wall. So if he keeps this, and sells the other, he himself must repair the Wall of the House of Office; for he whose Dirt it is, must keep it that it may not Trespass.

2 Keb. 825.  
Mod. Cases  
22, 245, 314.  
1 Bull. 116.

See the Book at large.

## O A T H S.

*Davis and Carter's Case.*

**D**avis and Carter stood in the Pillory, and the Court would not allow their Affidavits to be read. Hill. 7 W. 3. B. R. But Mich. 4 Ann. B. R. a Motion was made to set aside a Judgment for Irregularity on the Defendant's Affidavit; and Mr. Whitacre objected to the Reading it, because he was convict of Perjury.

2 Salk. 461.  
S. C. 5 Mod.  
74.  
3 Lev. 426.  
2 Salk. 513,  
514, 689.  
5 Mod. 15.  
3 Salk. 461.

Et per Holt C. J. Must he therefore suffer all Injuries, and have no Way to help himself?

Powell J. You ought to have the Record of Conviction in your Hand, when you make this Objection.

But per Holt C. J. If he had, it would be nothing to the Purpose.



## O B L I G A T I O N.

Cromwell *versus* Grunsden. Pasch. 10 W. 3.

2 Salk. 462,  
463.  
Cro. Car. 116.  
Moor 864.  
2 Bulst. 241.  
Lutw. 422,  
423.  
2 Jones 58.  
1 Brownl.  
110.

**I**N Debt upon an Obligation, the Plaintiff declared Quod cum Robertus Erlin, primo die Julii 1674. per scriptum suum obligatorium concessit se teneri & firmiter obligari in Quadragint. libris, &c. Et profert, &c. cujus dat. est eisdem die & anno. Upon Non est factum pleaded, the Jury found, the Defendant made a Deed in hæc verba, and that was in premid. vigin. in quadrans libris, dated the 1st of July, Anno Regni Car. 2. Millimo sexcent. septua. q<sup>to</sup>, and signed Robert Erlwin, conditioned to pay 20l. and if this be the same Deed, &c. Et per Cur'.

1 Show. 504.

1st, The Variance between the Name signed, which is Erlwin, and the Name in the Obligation, which is Erlin, is not material; because subscribing is no essential Part of the Deed; sealing is sufficient.

2 Mod. 285.

2dly, The Words in premid. vigin. and also the Anno Regni Car. 2. Millimo sexcent. septua. q<sup>to</sup> are void for Insensibility, and the Rest are Sense without them.

2 Cro. 146.  
Yelv. 65.  
Cro. El. 417.  
Yelv. 105.  
Style 241,  
257.

3dly, The Word quadrans had been void and insensible if it had stood by it self; but since it has Relation to the Condition, it shall be explained by the Condition, to signify 40 l. there being somewhat like quatuor or quadragint in it. Hob. 119. Quamquegenta for 500 l. Yelv. 95. Cro. Car. 147. Cro. Jac. 206. 1 Brownl. 62. 2 Rol. Abr. 146, 147. Hob. 19. doubted, 2 Jones 48. 1 Cro. 416, 418. 2 Cro. 338.

5 Mod. 248,  
&c.  
Yelv. 193.  
5 Co. 5.  
2 Ro. Abr.  
706.  
Farrell. 38.

4thly, An impossible Date is no Date, and where there is no Date the Plaintiff nevertheless must declare of it as made at a certain Time, and it is better to rest there, without cujus dat. est eisdem, &c. or gerens dat. eisdem; if the Declaration had been gerens dat. it had certainly been naught; because that could refer only to the express Date; but being cujus dat', they would intend it of the real Date, which is of the Delivery. Vide 2 Yelv. 193.

## Occupant and Occupancy.

Oldham *versus* Pickering. Pasch. 8 W. 3.  
Rot. 87.

**I**N Prohibition, upon Demurrer to the Declaration, the Case was, A. (who had Lands limited to him during the Life of B.) died Intestate, and the Plaintiff took out Administration, B. (the Cestuique vie) being still Living; there were Assets sufficient, besides this Estate pur autre vie, to pay all Debts, &c. The next of Kin to the Intestate libelled in the Spiritual Court against the Administrator, to have this Estate pur autre vie distributed. (1.) Carthew 376. 2 Salk. 464.

Per Curiam: Such an Estate still remains a Freehold, and the Administrator is Tenant of such Freehold, against whom the Præcipe must be brought if a Common Recovery should be had of the Lands; the Design of this Statute was only in Respect to Creditors, to make an Estate pur autre vie Assets for Payment of Debts, and for that End only the Administrator is made an Occupant, but in all other Respects the Quality of the Estate remains the same as it was before at Common Law; and the Spiritual Court never had any Jurisdiction in Cases of Freehold.

Oldham *versus* Pickering. Mich. 8 W. 3. *The same Case.*

**I**N Attachment for Prohibition, Thomas Oldham, being seised of a Messuage in the County of Chester, to him and his Assigns for three Lives, died Intestate, without Children, leaving only Anne Pickering his Sister. Administration was committed to Margaret Oldham, the Plaintiff; whom the Defendant now sues in the Spiritual Court of Chester for Distribution, and to exhibit an Inventory, which she exhibited, and omitted thereout the Estate pur autre vie; the Question was, Whether an Estate pur autre vie be not distributable in like Manner as Intestate's Goods and Chattels are, according to 22 & 23 Car. 2. by Force of 29 Car. 2. c. 3. which enacts, That an Estate pur autre vie shall (2.) 2 Salk. 464, 465. 2 Salk. 415, &c. Carth. 376. S. C.

shall be devisable; and if no Devise thereof be made, the same shall be chargeable in the Hands of the Heir, if it shall come to him by Reason of a special Occupancy, as Assets by Descent; as in Case of Lands in Fee-simple; and in Case there be no special Occupant thereof, it shall go to the Executors or Administrators of the Party that had the Estate thereof by Virtue of the Grant, and shall be Assets in their Hands.

The whole Court, viz. Holt, Rokeby, Turton and Eyre, unanimously gave Judgment, That the Prohibition should stand.

## O F F I C E S.

The King and Queen *against* Manlove, Warden of the Fleet, in Chancery. Mich. 2 W. & M.

( 1. )  
3 Lev. 288.

**I**T was found by Inquisition, on a Writ issued out of Chancery, that the Wardenship of the Fleet is an antient Office, and the Warden, an antient Officer, who Time out of Mind has had the Custody of all Prisoners committed by the Courts of Chancery, Common Pleas and Exchequer, and that the 19th of March, 1689. Richard Manlove was, and yet is Warden of the Prison of the Fleet, and that such a Day he voluntarily permitted Nicholas Stephens, in Execution, in his Custody, to Escape, and that at another Day he voluntarily permitted Henry Slaughter, also in Execution, to escape, and found divers other Misdemeanors by him committed in the said Office; and all this was done at the Prosecution of one Colonel Layton, with Intent to procure a Grant of the Office by the King to himself; to which Inquisition divers Exceptions were taken; but the Principal was, that 'twas not found by the Inquisition, what Estate Manlove had in the Office; for altho' those two voluntary Escapes were agreed to be a Forfeiture of the Office; yet if the Fee of the Office be in another, and Manlove has only an Estate for Life, as the Truth is, the Forfeiture of Manlove is only a Forfeiture of an Office for Life, and that is to him in the Reversion, and not to the King. 39 H. 6. 32. Poph. 119. the Case of the



the Earl of Pembroke; and so was the Case of the Lady Broughton lately, who had the Custody of the Prison of the Gatehouse at Westminster, under the Dean and Chapter; who being convicted of a Forfeiture before Hale, 'twas resolved by him and all the Judges of B. R. that the Forfeiture belonged to the Dean and Chapter, and not to the King; and of that Opinion was the now Lord Keeper, and the two Justices Holt and Pollexfen, whom he called to his Assistance, and quashed the Inquisition.

The King and Queen *versus* Larwood. Pasch.  
6 W. & M.

UPON an Information exhibited against the Defendant, (2.) for refusing to take upon him the Office of Sheriff of the City of N. The Defendant being a Dissenter, pleaded the Statute 13 Car. 2. by which 'tis enacted, that a Person elected into any Office in a Corporation, shall be such as within one Year before hath taken the Sacrament, according to the Church of England, or else the Election shall be void; and averred that he had not taken the Sacrament, &c. wherefore his Election was void.

Holt C. J. and Cur': The Statute of 13 Car. 2. was not made in Favour of the Dissenters, but the contrary, and was rather to exclude them from beneficial Offices, than to ease them from Offices of Charge; so that this Case is not within the Meaning of that Statute, which exempts none from executing or serving in any Office to which he was obliged before, being only to qualify him for executing Offices: And the King hath an Interest in every Subject, and a Right to his Service, and no Man can be exempt from the Office of Sheriff, but by Act of Parliament or Letters Patent. The Defendant here shall not be allowed to disable himself, to avoid this Office; no more than a Man shall be allowed to say, that he was an Idiot, or Non Compos, and so to avoid an Act done by himself: And where a Person may remove the Disability, as in Case of Excommunication, he shall take no Advantage of his Disability. Indeed if one is disabled by Judgment to bear an Office, he may be excused.

Judgment was given against the Defendant.

Carthew 306,  
307.  
Skinn. 574.

13 Car. 2. c. 1.  
2 Mod. 299.  
3 Lev. 116.  
Moor 111.  
Co. Lit. 247.  
1 Leon. 466.

Culliford *versus* Cardonnel. Hill. 8 W. 3.

(3.)  
Comberb.  
356.

Mod. Cafes  
234, 235.

4 Mod. 280,  
281.

A Man makes a Deputy in an Office of the Customs, (which Office is within the Statute of 5 & 6 Ed. 6. against selling Offices, and making Bonds and Securities thereon void) and takes Bond for accounting for the Profits, and that the Defendant shall pay him one Half of the Profits of the said Office: This Bond is not void by the Statute, nor is it a corrupt Agreement; for 'tis but reserving Part of what was wholly his; otherwise if it were to pay a Sum in Gross. Per Holt C. J.

The King may grant an Estate in an Office to commence in futuro, or upon Contingency, which shall arise out of the Inheritance he hath in the Office it self; for such he may have in Point of Interest, tho' not in Execution: Therefore the King can grant an Office by Way of Reversion, to hold after the Death of the first Grantee, &c. and may constitute his Grant in what Manner he thinks fit.

## Orders of Justices.

Lewisy *versus* Budd. Mich. 7 W. 3.

(1.)  
5 Mod. 68.  
Vide 2 Saund.  
423.  
2 Inst. 653,  
702.  
2 Rol. 289.  
Cro. El. 659,  
843.  
1 Bull. 20.  
2 Rol. Rep.  
262.  
5 Co. 67.  
1 Mod. 73.  
3 Leon. 208.  
1 Sid. 218.

Holt C. J. **T**his Case stands for the Resolution of the Court.

It is on two Orders grounded on 2 W. & M. for Scavengers Rates for Cleansing the Street of Newington. One Order saith, That all Inhabitants shall contribute to it; the other saith, That those who live on the Pavement shall contribute. The Question is, which of them is good?

We are of Opinion that all the Inhabitants shall contribute. For though it may be thought hard that they shall pay any Thing towards the Pavement who do not live on it, yet the Words of the Statute are so strong, that it lays the Charge on all the Inhabitants without Distinction; and where the Statute doth not distinguish, we have no Power to do it. Now in Newington there is a Street that

that is paved, and a great Part of the Town that is not; and there are several of the Parish that live out of the Town, and yet they are bound all to contribute. Then the Penalty of the Scavenger is given to the Overseers generally. How this would be on the Statute 13 & 14 Car. 2. we cannot tell; but on this Statute all the Inhabitants ought to contribute towards the Cleaning of the Pavement; and therefore one of the Orders is good, and the other is bad, and ought to be quashed.

*Inter the Inhabitants of the Parish of Chittinston and Penhurst. Mich. 8 W. 3.*

**A**N Order to remove a poor Person from Chittinston to Penhurst was quashed, because 'twas not said, that one of the Justices was of the Quorum. (2.)  
2 Salk. 475.

Holt C. J. said, That some had been of Opinion, that an Order was good notwithstanding this Omission, and perhaps it has been so adjudged; but he was of Opinion, That this being a special Authority out of Sessions, it ought to appear that it was exactly pursued. Vide Farrefly 99.  
Mod. Caf. 99.

*Green and Pope. Mich. 8 W. 3.*

**B**Rewer excepted against an Order of two Justices, to remove a poor Person. 1. That it is not said in the Order, that the Man did not Rent 10l. per Annum. 2. That it doth not appear, that one of the two Justices was of the Quorum. (3.)  
Com. 400.

Holt C. J. said, the first Exception had been solemnly over-ruled; but for the second Objection, the Order was reversed; and then the Order of Sessions falls to the Ground.

And the next Day, in Pool's Case, Holt C. J. said, the Order should begin, Whereas Complaint hath been made unto us two Justices, &c. Quorum unus, Wy, &c.

*The King versus Albert Alverston. Mich. 10 W. 3.*

**B**y an Order of two Justices, &c. the Defendant being adjudged the reputed Father of a Bastard Child, was thereby charged to maintain it; which Order was Special. (4.)  
Carthew 469,  
470.  
ff. It



It recited, that Mary Spence, the Wife of Jonathan Spence, Mariner, was delivered of a Male Bastard-Child, and that it appeared to them upon Oath of, &c. That Jonathan Spence, her Husband, was in the King's Service at Cadiz in Spain, and not within the King of England's Dominions at the Time when the said Child was begotten or born; which Order was confirmed upon an Appeal.

An Exception was to the Order, (viz.) for that it is not alledged therein, that the Husband was beyond Sea, for the Space of forty Weeks before the Birth of the Child; and 'tis not sufficient to say, that he was beyond Sea at the Time of the Conception, because that is what in Nature cannot certainly be known.

And for this Reason only, these Orders were quashed; but the Court bound the Defendant by Recognizance to appear at the next Quarter-Sessions for Middlesex, being inclinable to bring the Case within the Intent of the Statute 18 Eliz. because of the frequent Mischiefs of this Kind which have happened amongst Seamen's Wives.

Anonymus. Mich. 10 W. 3.

( 5. )  
2 Salk. 482.

If the first Order be naught, no subsequent Order on an Appeal can make it good. Hill. 11 W. 3. B. R. this Rule was taken by Holt C. J. And Trin. 2 Ann. the same Resolution between Selon and Ripley.

*The Case of the Parish of St. Leonard Shoreditch.*  
Mich. 10 W. 3.

( 6. )  
2 Salk. 483.  
2 Salk. 472.  
Farrell. 10.

A Rate made by the Church-wardens, &c. for Relief of the Poor, was confirmed by two Justices; nothing was taxed for the Personal Estate, but all upon the Real; several Inhabitants appealed to the Sessions; the Rate was there quashed, and the Church-wardens, &c. ordered to make a new Rate upon both Real and Personal Estates. In the new Rate the Real Estate was taxed ten Times more in Proportion than the Personal Estate. Several Inhabitants appealed again; this Rate was likewise vacated; and now Northey and Shower moved to quash these Orders, urging, That the Sessions could only relieve particular Persons grieved, but could not set aside whole Rates

Rates at once. Sed per tot. Cur. viz. Holt, Rokeby, and Turton, the Sessions, upon an Appeal of particular Persons grieved, may, if they see Cause, set aside the Rate. See the Act 43 El. c. 2. sect. 6. And in either of these Cases, the Justices could not have given Relief, without setting aside the whole Rate. And they may make a new Rate themselves, or order the Church-wardens and Overseers to make a new Rate; as was done in this Case. The Orders were confirmed.

Sr. Nicholas Guilford *versus* The Parish of Killington. Trin. 11 W. 3.

**M**otion to quash an Order of two Justices, to remove a Woman and her Bastard-Child from A. to B. (7.)  
whereas it appeared in the Order that the Child was born 2 Salk. 485.  
at C. 2 Salk. 427.  
482, 528, 532.

Holt C. J. The Bastard must be kept where born.

Precinct of Bridewell *versus* The Parish of Clerkenwell. Hill. 11 W. 3.

Per Holt C. J. **I**f a Place is extraparochial, and has not (8.)  
the Face of a Parish, the Justices have 2 Salk. 486.  
no Authority to send any Man thither: And so it was re- But none; in  
solved in the Case of Sir John Osborne. Possibly a Place the Case of  
extraparochial may be taxed in Aid of a Parish, but a Pa- the Inhabi-  
rish shall not in Aid of that. This is Casus omisus. This tants of  
Order was quashed. Stockelane and  
Dolting, Hill.  
11 Ann. B. R.

Parker C. J. and the whole Court, That by Virtue of 13 & 14 Car. 2. cap. 12. sect. 21. The Justices may exercise the Powers given by 43 El. and that Act, in all extraparochial Places, containing more Houses than one, so as to come under the Denomination of a Vill or Township. 2 Salk. 487, 501. 2 Lev. 142, 143. 4 Mod. 157, 158. 1 Mod. 251. 2 Mod. 237.

Inter the Inhabitants of Chalbury and Chipping Farringdon. Trin. 12 W. 3.

**H** Was removed by Order of two Justices, from the (9.)  
Parish of A. in Warwickshire, to Chalbury in Ox- 2 Salk. 488.  
fordshire; from thence, by Order of two Justices, to Chip-  
ping Farringdon in Berkshire. It was objected, That Chal- 2 Salk. 481.  
bury ought to have appealed, to have the Order upon them

discharged: Which Holt C. J. agreed; for sending the poor Man to another Place is falsifying the first Order, which cannot be done but by Appeal.

The King *versus* The Inhabitants of Long Critchell. Mich. 12 W. 3.

(10.)  
2 Salk. 489.

A Man was removed from the Parish of All-hallows to the Parish of Long Critchell; he goes from Long Critchell to P. They got several Orders from two Justices by Way of Execution of the first Order, to remove him from P. to L. but all of them were quashed; because P. ought to have made an original Complaint, and upon that have got an Order; and not have grafted on the Order of Removal from A. to L. tho' they might have used that as Evidence. The Orders were quashed upon this Reason.

Weston Rivers *versus* St. Peter's in Marlborough.

(11.)  
2 Salk. 492,  
493.  
2 Salk. 491,  
524, 536.  
Farrell. 54.  
Mod. Caf. 88.

UPON an Order of two Justices, it was objected; 1st, That it was not said, that the Woman was Poor, &c. but lame, and likely to become Poor. 2dly, That it was not said, she did not offer Security. 3dly, That it was said, to be upon Complaint only, and not of the Church-wardens, &c. 4thly, It was not said, she rented not a Tenement of 10 l. per Annum. The two last were the Objections chiefly insisted upon; and the Court was clear as to the first of these Two, viz. That it must be upon Complaint of the Church-wardens, &c. and so appear.

At another Day Holt C. J. Pronounced Judgment as to the Exception to not averring that she did not Rent a Tenement of 10 l. per Annum; he said the Secondary had searched the Precedents, and they are without this Clause, according to the Form of the Orders before 14 Car. 2. And this Order therefore is well enough, and if the Party rents a Tenement of 10 l. per Annum, he may appeal to Sessions. As to the other Exception it is fatal, for no one can disturb a Man coming into a Parish, but they that have Authority to do it. A Complaint *ex Officio* from one not concerned is nothing; it may be the Parish are willing to keep him.



The King *versus* Johnson. Trin. 13 W. 3.

**E**xception was taken to an Order for discharging an Apprentice: 1st, That the Complaint was made originally at Sessions, without previous Application to a Justice out of Sessions. 2dly, That the Justices had ordered Money to be returned. (12.)  
1 Salk. 68.  
1 Salk. 67.

Holt C. J. Delivered the Resolution of the Court, that the Order was good. If it had been a new Question, he should have held a prior Application necessary; but after so many Orders affirmed in this Court, which have been otherwise, 'tis too late to unsettle that now. As to the second Point, he never doubted that; it is a Power consequential upon their Jurisdiction to discharge. 1 Mod. 2.  
1 Saund. 314,  
contra pl. 4.  
Post 490.  
497.  
1 Mod. 287.  
Far. 55.  
2 Salk. 470,  
490.  
1 Saund. 314.

The Queen *versus* Glin & al'. Mich. 2 Ann.

**T**hey were indicted for not producing the Parish Books of Rates before certain Justices of Peace, appointed by the Rest to examine and make Orders thereupon, and for disobeying such Orders. And it was excepted, That this was a Delegation of their Authority, which they could not do. 2d Exception was, That Notice of the Order was not alledged. (13.)  
6 Mod. 87.

Holt C. J. I am not satisfied that they can ever refer the Examination of the Matter to a certain Number of themselves; because they are all Judges of the Fact, and therefore they transact it as Judges in Court; but allow they may refer the Examination of the Fact, and reserve the Judgment to themselves; yet doubtless they cannot give a Power to make Rates and Orders. And it was quashed. 6 Mod. 77,  
97.

St. Andrew's Holborn *versus* St. Clement's Danes.  
Mich. 3 Ann.

**T**HE Quarter-Sessions made an Order, and afterwards the same Sessions vacated it by a subsequent Order; upon a Certiorari both Orders were returned. (14.)  
2 Salk. 494.  
6 Mod. 287.  
2 Salk. 605,  
606.  
5 Mod. 356.

Et per Holt C. J. You should not have returned the vacated Order, but only the latter. The Sessions is all one Day,

Day, and the Justices may alter their Judgment at any Time while it continues; thus at the Old Baily, you see Judgment de Pain fort & dure given, and yet if the Party will plead, we will set aside that Judgment, and admit him to plead.

The Queen *versus* Banes. Pasch. 5 Ann.

(15.)  
Salk. 680.  
A Man moved out of his Office for Extortion in the Execution of his Office; and this Motion with the Cause was returned on a Mandamus, and objected unto, for that the Return did not set out on a Motion, upon the Articles exhibited in Writing, and the Judges were divided Two against Two; so no Judgment.

**T**his Case came this Day upon the Verits, and was thus: The Defendant was Clerk of the Peace for the County of B. and upon the Statute was moved for Extortion; and the Order was, that the said Banes had committed the several Extortions following, and for which Articles were exhibited against him, viz. that he took and exacted from B. 8 s. for a Subpoena, tho' the same contained but twelve Lines. 2. That he exacted 9 s. from Prisoner Longhorn, more than his just Fees. 3. Last, he is charged in the said Articles to have committed divers other Exactions; then the Adjudication is, that whereas the said Defendant had committed the Exactions in the Premises, and divers others in the Execution of his Office, they did therefore remove him, &c. This Case was argued by Sir Thomas Powys, that the Order was good, because it charges him with these Crimes in Execution of his Office; the Order begins and says, that the Defendant committed these Crimes following in the Execution of his Office, viz. so that under this viz. the two first Charges, it fully appears, that all was exacted in the Execution of his Office; so it needs not, that every particular Article should charge him, that in the Execution of his Office he took, &c. when 'tis in the Beginning of the Charge and Order; besides the Adjudication is Right, for there 'tis said by the Justices: Whereas it doth appear unto us, on due Trial and Examination, that the Defendant was guilty of Extortion in the Execution of his Office; there they do adjudge, &c. this is full and express, and he said, that this being after Trial, it might be well; for an Indictment, which would be bad on Demurrer, was held good after Aldrich. 1 Sid. 91. 3 Keb. 357. The 2d Article is, that he exacted 9 s. from Prisoner Longhorn more than his Fees, that must be intended his Fees, as Clerk of the Peace; it appears by the Order, that he is Clerk of the Peace; and it does not appear that he had any other Office or Employment for which any Fees were due to him; and surely it would be a very  
foreign

foreign Intendment to say, those Fees might be due to him as Attorney, &c. The last Article is, that he committed several other Extortions and Exactions in the Execution of his Office; tho' I confess this Charge is general, and would not alone be sufficient to charge him, yet being coupled with particular Articles, Evidence may be given on this general Charge; so is *D<sup>r</sup>. Manning's Case*, 2 Brownl. 191. and Orders are more favourably construed than Indictments. 1 Ventr. 37. On the Reason that Wills are more favourably construed than Conveyances, and so are Verdicts than Pleadings, &c. because done by Lay Gents, and therefore strict Forms are not so requisite as in the others, that are to be done by those who are learned in the Laws.

Raymond for the Defendant said, the Order was not good, being uncertain, for he is not charged with any one Crime in the Execution of his Office, but the general Charge, which is uncertain; for the Defendant by the same Statute has a Freehold in his Office; and tho' the Justices have Power to turn him out of his Office, yet they must pursue that Power, and therefore there are to be Articles in Writing to be exhibited against him, wherein his Crime is to be particularly set forth; for neither the Recital of the Order by the Justices, nor the Recital of the Charge by the Prosecutor, that these Crimes were committed in the Execution of his Office, is sufficient; because the Act of Parliament is, that he is to be charged with his Crime in the very Article.

Holt C. J. This Act of Parliament, quoad Taking away the Defendant's Freehold, was contrary to Magna Charta, and therefore to be taken strictly; as to *D<sup>r</sup>. Manning's Case*, that cannot signify any Thing; for if you do not prove the particular Charge, your general falls; and so 'tis in the Book; and 'tis not unlike alia enormia in Trespass, being Matter of Aggravation. I do remember that a Man brought Trespass for Entering his House & alia enormia, and 'twas given in Evidence, that he entered the Plaintiff's House, and lay with his Daughter, and got her with Child; and this was held good, and good Damages were given; but still you shall not on an alia enormia give a new and distinct Trespass in Evidence; as to the Case cited between the King and Gower, I have a Report of the Case, and I doubt 'tis not good Law, for that no Statute of Jeofails extends to Indictments, &c. 'tis true, that that is helped by the Verdict, which would otherwise be insuffi-



cient; but no Verdict shall make your Charge more extensive, and so is the Common Law; and with this Difference agree criminal Warrants this Day, because that no Statute of Jeofails extends to them.

Holt C. J. and Powell J. Agreed the Difference between Orders and Indictments; but that even in Orders, if Substance be wanting, the Order cannot be made good; but such strict Forms are not so necessary in Orders as Indictments; but Gould J. thought the Articles particularly charged under the Viz.

Powys J. doubted; the Case was adjourned.

The Queen *versus* Banes. Pasch. 5 Ann.

(16.) **T**his Case was this Day argued by the Justices *seriatim*; and Gould thought the Order was good; for the Order is, Whereas Richard Banes was charged with divers Misdemeanors in the Execution of his Office, in these Articles following, viz. That he took from Scott 8 s. for a Subpoena, which was more than his Fee, tho' the same contained no more than twelve Lines. 2. That he exacted of Prisoner L. 9 s. more than his Fee, &c. and that he committed divers other Misdemeanors *colore officii*; and there the Order shews, that he was heard by his Counsel at the Sessions; and that upon due Proof and a full Hearing, he was convicted of these Misdemeanors above-mentioned; and so by Virtue of the Act of Parliament they removed him. Now, says Gould, what fuller Conviction can be than this? when the Case is heard and determined on the Merits? For tho' when the Misdemeanors are particularly set forth, it does not say *colore officii*, yet when 'tis in the Beginning of the Order, that these Misdemeanors following were committed by him in the Execution of his Office, viz. and so sets down the Charge there, the Viz. ties all these to be done in the Execution of his Office, viz. is explanatory here; and Authorities do make them good and effectual, when they explain what is said before; when the Viz. is repugnant, then 'tis void, but when it stands with the Matter precedent, then 'tis a direct Affirmative. 1 Saund. 169, 170. Ventr. 107. 'Tis objected, That the Defendant had a Freehold in his Office, 'tis true; but the same Act of Parliament, which does give him the Freehold therein, viz. *Dum se bene gesserit*, does empower the Justices of Peace in their Quarter-Sessions to remove

remove him, if he commits any Misdemeanor in his Office; therefore I think him well removed.

Powys J. I do agree with my Brother, for there's no Need of a Jury to take his Freehold from him; for the same Act, that made this a Freehold to him, takes it away from him for Misbehaving himself therein, and he must take it as he got it; and that was upon this Condition, to behave himself well therein; there's a great Difference between Orders and Indictments, the former being ever favourably taken, because made by Lay Gents, Justices of Peace, and therefore we will not pry into them with Eagles Eyes; and for this we have several Cases. 1 Vent. 37. 336. But Indictments are to be drawn by Counsel learned in the Laws, therefore must be taken more strictly; but even in Indictments there are two Precedents in West's Precedents, scil. 97. and 130. which were held good, and a fortiori here in Order of the Justices of Peace: Now the Defendant had a full Hearing, upon the Verits, before the Justices; and by the several Continuances which appear upon this Order, it appears he had Time enough to make his Defence, if he were as innocent as he pretends to be; now, I think, the Charge is as full as can be in the Execution of his Office, for the Viz. does tie down the particular Misdemeanors to have been in the Execution of his Office. Suppose I had said, that I received several Sums of Money in Part of such a Debt, viz. 20l. such a Day, and 20l. at such another Day, and 20l. at a third Day; is there any Necessity to repeat after each of these Sums, that it was in Part of the said Debt. Surely no, for I say at first, that all these Sums were in Part of such a Debt; this would be a needless Repetition. I think the first Charge is not so well as it might be, tho' 'tis said by the Justices to have been in the Execution of his Office; but the second Charge is full, and I think it would be a very foreign Intendment, to suppose the Defendant an Attorney, or that he was to have any other Fee than as Clerk of the Peace secundum subjectam materiam; and I have that Respect to the Justices that heard this Cause, upon full Proof, that I cannot be of Opinion, that they did amiss.

Powell J. I differ from my Brothers, and I think that this being a Freehold is considerable, and not like a Chattel, and not to be defeated without Entry or Claim; some Solemnity is requisite, 'tis said that it is a new Freehold, yet it makes no Difference, for 'tis still a Freehold; and tho' this Act of Parliament gives a Power to the Justices  
of

of Peace to take it away, yet I take it that the A<sup>t</sup> must be strictly pursued. The best Way to take away a Freehold is by Judge and Jury, for the one is a Check upon the other. Now whether the Justices have strictly pursued the Authority given to them by this A<sup>t</sup> of Parliament, is the only Question here: Now by this A<sup>t</sup> there must be a Charge in Writing, of Misdemeanors committed by the Defendant in the Execution of his Office, and not a general Charge, as is here; for it is like Barreter, where the Instances are to be particularly set forth, that the Defendant may make his Answer ready. The Viz. does not help at all, as this Case is, because the Particulars, with which he is charged, must be such as in their Nature must be in the Execution of his Office. Suppose under the Viz. the Misdemeanors had been, that he was drunk such a Day, and lay with a Woman such a Day, &c. surely here the Viz. would not tie down these to be in the Execution of his Office. Besides, that these Crimes were done by the Defendant in his Office, is not in the Articles exhibited against him, but are only by way of Recital in the Order of the Justices. Suppose I was indicted for feloniously taking these Goods following, viz. a Horse from A. a Sheep from B. &c. this would not be good, for felonice must be after each of them. It is true, Orders are to be taken more favourably than Indictments, but yet the Substance must appear in both. I take the Charge or Articles here to have been so uncertain, that though the Defendant had a Copy, yet he could not possibly answer there; and by what appears in the Articles, I cannot see that the Defendant did commit any Fault in the Execution of his Office. As to the second Charge, upon which my Brothers do depend, for the first seems to be given up, viz. that he exacted 9 s. more than his just Fee from Prisoner L. they should shew what his Fee was, or else it is bad. 3 Lev. 268.

Holt C. J. I think the Order should be quashed. And I here consider two things; first, the Particular Charge, and next, the Recital.

First, Though the Charge may be well enough, though it may not have legal Form, yet it must be good in Substance, and must so charge the Defendant, that he may know to what he is to answer; and we are to see whether such a Charge is sufficient for them to ground their Proceedings upon it. These Articles are Informations and Accusations, and I see no Reason why they must not be as certain as any other Informations. Why, says my Brother, because Ju-

stices



Justices of Peace are not so skillful. But shall I then lose my Freehold and Property by the Unskillfulness of the Justices? surely no. Nor shall I lose my Freehold or Property by an uncertain Charge or Accusation; besides, it is not the Justices that draw the Articles, for they know not of them till they are brought before them; but they then send a Copy of them to the Defendant, to make his Answer; and that is the Reason why the Act requires that the Charge should be in Writing. It is possible he might commit forty horrid Crimes whilst he was in his Office, and yet none of them be *colore officii*. As to the first Charge, that he took from Scott 8 s. &c. he does not shew whether this was in Execution of his Office or not, and I cannot think it was; and the second Charge is as uncertain.

Secondly. This Recital is no Part of the Charge or Articles; this is only the Conclusion, or Inference of the Justices of Peace upon the Hearing, which they ought not to do; therefore the Act of Parliament is not pursued, whereby it is directed that Articles should be exhibited against him, of Misdemeanors committed by him in the Execution of his Office; and we, having Jurisdiction over them, do plainly see that there were no Articles of any Misdemeanors committed by him in the Execution of his Office. Note; Powis J. did formerly think this Order not good, but changed his Opinion. The Court being divided, the Order stood, but without being affirmed.

Holt C. J. would have it adjourned into the Exchequer Chamber, or have the Opinion of the rest of the Judges therein.

*The Case of Foxham-Tithing in Com. Wilts.  
Hill. 3 Ann.*

A Justice of Peace was Surveyor of the Highway; and a Batter which concerned his Office coming in Question at the Sessions, he joined in making the Order, and his Name was put in the Caption. (17.) 2 Salk. 607.

Et per Holt C. J. It ought not to be.  
It was quashed.

## O U T L A W R Y.

Arthur's Case. Hill. 8 W. 3.

2 Salk. 495.

**T**HIS Man was outlawed for Felony on several Indictments; afterwards he came in, and being brought to the Bar was asked, what he had to say, why Judgment should not be given against him.

Holt C. J. If the Party hath no Lands, the Attorney General may confess Error, and then he shall plead presently, and be tried upon the Indictments: But if he hath Lands, there must be a Scire facias against the Lords, mediate and immediate, to shew Cause why he should not have Restitution; though it may be suggested on the Roll that he has no Lands, and if the Attorney General confesses it, there needs no such Writ.

See Levari facias.

## O Y E R.

Longavil *versus* The Hundred of Isleworth.  
Mich. 2 Ann.

2 Salk. 498.  
S. C. 6 Mod.  
27, 28.

**I**N Debt, against the Hundred of Isleworth, the Defendant pleaded in Abatement Caption del Robbers, &c. The Plaintiff replied, Nul Caption, &c. upon which it was demurred, and a Respondeas ouster awarded; and now all being the same Term, the Defendant craved Oyer of the Writ, and that being set forth, pleaded the General Issue.

6 Mod. 28,  
292.

Et per Holt C. J. To deny Oyer where it ought to be granted, is Error, but not eontra. Therefore we ought either to grant, or to enter the Denial upon Record, that they may assign it for Error. If the Plaintiff will contest it, he may strike out the rest of the Pleading, and demur, in order to obstruct the Oyer. And at another Day it was ruled,

ruled, that the Defendant could not have Oyer, because he had already pleaded in Abatement; and having of Oyer is never to enable the Party to plead in Bar, but to plead to the Writ; which is done already, and therefore pass.

## P A R D O N.

Cooke's Case. Pasch. 2 W. & M.

**A** Writ of Error was brought by Cooke to reverse an Outlawry against him for Murder, whereon being forthwith arraigned, he pleaded his Pardon under the Great Seal, in which there was no Non obstante for his not finding Sureties for his good Behaviour. (1.) Carthew 121.

By Holt C. J. The Pardon ought not to be allowed, without a Writ of Allowance, directed to the Judges of this Court out of Chancery, testifying that he hath found Sureties for his good Behaviour before the Coroner and Sheriff, &c. according to the Statute. But the other Judges were of Opinion, that the Pardon might now be allowed, though without any Writ of Allowance; because the Party hath three Months given by the Act, after the Pardon, to find Sureties. Afterwards, in the same Term, the Writ of Allowance was brought in, and upon Prayer, &c. retorded under the Pardon. 10 E. 3. c. 3. Sec 5 & 6 W. & M.

The King *versus* Parsons. Mich. 3 W. & M.

**T**HE Defendant was outlawed for killing one Wade in Essex, for which he had fled, and continued beyond Sea till the Revolution; and then appearing publicly about London, he was complained of to the Chief Justice, and by him committed to the Marshals; then the Defendant reversed his Outlawry, and was tried, and convicted of Murder, and condemned: Upon which he pleads a Pardon for the Murder by express Words, without any Non obstante, that being taken away by Statute; but he produced his Writ of Allowance, &c. (2.) 1 Show. 282. 4 Mod. 61. 2 Salk. 499.

The



3 Inst. 235.  
Reg. Orig.  
2 Ed. 3. c. 2.  
13 R. 2. c. 1.

The Allowance of this Pardon was greatly opposed by Counsel, who argued, that the Crime could not be pardoned; for since Christianity was planted in England, Murder was always a Crime beyond Mercy; and Sir Edward Coke saith, that he never saw any Pardon of Murder by express Name: And our Kings here have been always so far from pardoning Murder by express Words, that formerly they did not so much as pardon Homicide, or Manslaughter, but in very soft and gentle Terms. In the Register there are Forms of Writs of Allowance, where the King extends his Mercy to Persons killing others per infortunium, but no such Writ for Murder, for which no Mercy should be shewed; and this appears by the Coronation Oath.

Holt C. J. The Power of pardoning all Offences, is an inseparable Incident to the Crown; and it is equally for the Good of the People, that the King should pardon, as that he should punish. And in this Case, there is as good Reason why the King should pardon an Indictment of Murder, which is his Suit, as for a Subject to discharge an Appeal, which is the Suit of the Subject; and the King by his Coronation Oath is to shew Mercy, as well as to do Justice. The Statute 2 Ed. 3. meant only, that the King should be fully informed, before he pardoned any Felony; nor doth that, or the other Statutes take away the King's Prerogative, but prescribe certain Forms that Charters of Pardon may not be so easily granted; for before the making of these Acts, it was usual to apply to the Lord Chancellor, and gain a Pardon by undue Means on false Suggestions, with general Words therein; and this was the Occasion of those restrictive Statutes, that Application shall be made to the King in Person, to the Intent he may be himself apprised of the Matter. By the 13 R. 2. great Difficulties are put upon those that shall be Suitors for a Pardon of Murder, they incur a Penalty, &c. But this was found grievous to the Subject, and therefore repealed by 16 R. 2. which shews the Necessity there is, that the King should have a Power of Pardoning; and such Regulations in the Manner of it were not necessary, if at the Common Law the King had no Power to pardon Murder.

The Pardon was allowed.

The Queen *versus* Foxworthy. Hill. 1 Ann.

**I**n this Case, the Defendant being attainted of Murder, (3.)  
he obtained the Queen's Pardon, and was brought to Farrell. 153.  
the Bar to plead it; on reading of which it appeared, the  
Word *attincturat* was not in it.

Holt C. J. said, he would consider before he would allow  
it; and at another Time the Pardon being amended, and  
*attincturat* put in, this Pardon was allowed, which was up- 2 Hawk. 393.  
on Condition of going beyond the Seas, &c. And it was  
here agreed, that if after the Allowance of the Pardon, the  
Defendant broke the Peace, he might notwithstanding his  
Pardon, be detained for that Offence; and in such Case he  
should be brought up again, and asked, what he had to say,  
why Sentence should not pass? And if he pleaded the Par-  
don, the Attorney General would reply the Condition and  
Breach, &c.

But Holt C. J. would not permit any Civil Action to be Raym. 370.  
brought against him, which might defeat his Pardon, by 5 Rep. 50.  
rendering him incapable of performing the Condition there-  
of.

It was held by Holt C. J. in *Groanvelt's Case*, that the 3 Salk. 265,  
King may pardon an Offence and remit the Crime, for this 266.  
is a Prerogative which he cannot part withal; for as he hath  
the Publick Revenge in his Hands, so it is necessary, and for  
his Honour, to have a Power of mitigating or remitting the  
Exercise of it. And where a Man is indicted for Treason, 1 Vent. 217.  
a Pardon is good, although it doth not mention the In-  
dictment: But it is not so when the Defendant is indicted  
of Murder, because by the Statute 27 Ed. 3. the Pardon  
must recite the Indictment.

## P A R I S H E S.

Herman *versus* Denne. Mich. 7 W. 3Cases W. 3.  
32.

**N**Orthey moved on the Statute 22 Car. 2. c. 11. about the Rates for repairing the Church of St. Swithin, and per Holt C. J. Rookby and Eyre, at Common Law there might be an Union; but that was only of Churches, and but as an Appropriation of one Rectory to another, but still the Parishes were distinct; and that did not make the Parish Church of A. to be the Parish Church of B. but the Incumbent was as well Incumbent of B. as A. and is obliged to serve the Cure, if necessary. But by this Statute, the Parish Church of St. Swithin is the Parish Church of St. Mary Bothaw, and the other Church is thereby destroyed; and therefore that Parish must repair St. Swithin's.

## P A R L I A M E N T.

Culliford *versus* Blandford. Pasch. 4 W. & M.(1.)  
Carthew  
232, 233,  
234.

**A**N Action upon the Statute 23 H. 6. against a Person, for a false Return of a Burgess to Parliament, was prosecuted in this Court by Bill, by a common Informer qui tam, &c. for the Penalty of 40 l. after the Time given by the Statute for the Party chosen was elapsed: But it appearing, that the Laritat, the Process on which the Defendant appeared, was sued out within the Year after the Offence; upon this a Question in Law did arise.

Holt C. J. This Action is for a Penalty given by Statute, for which the Plaintiff might have brought an Action of Debt by Original here, by Reason the Statute gives the Action; and there is a Difference between a Civil Action and an Action given by Statute; for in the first Case, the

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suing out a Latitat within the Time, and continuing it afterwards, will be sufficient; but in the other Case, if the Party proceeds by Bill, he ought to file it within Time, that it may appear so to be on the Record itself. Three Judges held, that the suing out the Latitat in this Case within the Year, was a sufficient Commencement of the Suit to save the Limitation of Time; because it is the Original of B. R. and may be continued on Record as an Original Writ, &c.

The Plaintiff had Judgment; but Writ of Error was brought.

Prideaux *versus* Morris. Trin. 2 Ann.

**A**ction on the Case for a false Return of Parliament-  
Men, against the Sheriff; here the Plaintiff declared, that whereas he was duly elected, the Sheriff returned another to be so, who in fact was not duly elected. The Question was, whether, this being a Parliamentary Matter, might be determined here in this Court? (2.)

2 Salk. 502.  
Farrell. 13.

Holt C. J. The Cause of the Plaintiff's Suit is a Wrong done out of Parliament, and whatever falls under the Regulation of Law in such Case, is subject to the Law of the Land; for Laws are to be executed out of Parliament; But for the Rules of the House of Commons, as to their Sitting, &c. they are within the House, and the Judges cannot know them, there being no Practice of them out of the Parliament; yet if a Law should be made relating to them, or they should become necessary to be determined on account of some other Matter cognizable by the Judges, we must take Notice of and determine them. Though I think, for a false Return the Party can have no Action, where there may be a Determination in the House of Commons, because of the Inconvenience of contrary Resolutions; and so here, if one is voted elected, another Person cannot bring an Action and say, that he was duly elected and returned, because his Name does not appear upon Record: But where the Right of Election, either is determined, or cannot be determined in Parliament, as in Case of a Dissolution, &c. an Action lies for the false Return.

3 Lev. 29.  
2 Lev. 50,  
114, 250.  
Lutw. 88.  
Pollexf. 470.  
2 Vent. 50.  
2 Keb. 435.  
1 Cro. 142.  
Mod. Cal.  
48.

And he was of Opinion, that for a double Return, no Action lay against the Sheriff before the Statute 7 & 8 W. 3. Not only as it is the only Method he hath to indemnify himself, but when the Right comes to be determined in Par-

7 & 8 W. 3.  
c. 7.

Par-

Parliament, one Indenture returned is taken off the File, and then there is no double Return.

*Ashby versus White & al.* Mich. 2 Ann.

(3.)  
Mod. Caf.  
45, 50, 53,  
56.  
1 Salk. 19,  
20.  
3 Salk. 17.

**I**N Aſſion upon the Caſe againſt the Conſtables of Aileſbury, the Plaintiff declared, that ſuch a Day the late King's Writ iſſued and was delivered to the Sheriff of B. for Election of Members of Parliament in his County; whereupon the ſaid Sheriff made out his Precept or Warrant to the Defendants, being Conſtables of A. to chuſe two Burgeſſes for that Borough, which Precept was delivered to the ſaid Conſtables; and that, in Purſuance thereof, the Burgeſſes were duly aſſembled, &c. and the Plaintiff, being then duly qualified to vote for the Election of two Burgeſſes, offered to give his Voice for Sir T. L. and S. M. Eſq; to be Burgeſſes of Parliament for the ſaid Borough; but the Defendants knowing the Premiſſes, with Malice, &c. obſtruded him from voting, and reſuſed and would not receive his Vote, nor allow it; and that two Burgeſſes were choſe, without allowing or receiving his Voice: A Verdict was found for the Plaintiff, and upon Motion in Arreſt of Judgment, three Judges held, that this Aſſion would not lie, till the Parliament had decided, whether the Plaintiff had a Right to vote as an Elektor.

Holt C. J. The Caſe is truly ſtated, and the only Queſtion is, whether or not, if a Burgeſſ of a Borough, that has an undoubted Right to give his Vote for the chuſing a Burgeſſ of Parliament for that Borough, is reſuſed giving his Vote, has any Remedy in the King's Courts for this Wrong againſt the Wrong-doer? All my Brothers agree, that he has no Remedy; but I differ from them, for I think the Aſſion well maintainable, that the Plaintiff had a Right to vote, and that in Conſequence thereof the Law gives him a Remedy, if he is obſtruded; and this Aſſion is the proper Remedy. By the Common Law of England, every Commoner hath a Right not to be ſubjected to Laws, made without their Conſent; and becauſe it cannot be given by every individual Man in Perſon, by Reaſon of Number and Confuſion, therefore that Power is lodged in their Repreſentatives, elected by them for that Purpoſe, who are either Knights, Citizens or Burgeſſes: And the Grievance here is, that the Party not being allowed his Vote, is not repreſented. The Election of Knights of Shires is by

Freeholders; and a Freeholder has a Right to vote by Reason of his Freehold, and it is a real Right; and the Value of his Freehold was not material till the Statute of H. 7. <sup>8 H. 7. c. 7.</sup> which requires it should be 40 s. a-year, for before that every Freeholder, though of never so small a Value, had a Right to vote at these Elections. In Boroughs, some of which are by Prescription, they have a Right of voting Ratione Burgarii, and Ratione Tenuræ; and this like the Case of a Freeholder before mentioned is a real Right, annexed to the Tenure in Burgage: And in Cities and Corporations, it is a personal Inheritance, and vested in the whole Corporation, but to be used and exercised by the particular Members; and such a Privilege cannot be granted but to a Corporation. This is a noble Franchise and Right, which entitles the Subject in a Share of the Government and Legislature. And here the Plaintiff having this Right, it is apparent that the Officer did exclude him from the Enjoyment of it, wherein none will say he has done well, but Wrong to the Plaintiff; and it is not at all material whether the Candidate, that he would have voted for, were chosen, or likely to be, for the Plaintiff's Right is the same, and being hindered of that, he has Injury done him, for which he ought to have Remedy. It is a vain Thing to imagine, there should be Right without a Remedy; for Want of Right and Want of Remedy are Convertibles: If a Statute gives a Right, the Common Law will give Remedy to maintain it; and where-ever there is Injury, it imports a Damage: And there can be no Petition in this Case to the Parliament, nor can they judge of this Injury, or give Damages to the Plaintiff. Although this Matter relates to the Parliament, yet it is an Injury precedaneous to the Parliament; and where Parliamentary Matters come before us, as incident to a Cause of Action concerning the Property of the Subject, which we in Duty must determine, though the incident Matter be Parliamentary, we must not be deterred, but are bound by our Oaths to determine it. The Law consists not in particular Instances, but in the Reason that rules them; and if where a Man is injured in one Sort of Right he has a good Action, why shall he not have it in another? And though the House of Commons have Right to decide Elections, yet they cannot judge of the Charter originally, but secondarily in the Determination of the Election; and therefore where an Election does not come in Debate, as it doth not in this Case, they have nothing to do: And we are to exert and vindicate the

Hob. 14.  
12 Rep. 120:  
Moor 812.  
2 Roll. 311.  
Cro. Jac.  
478.  
1 Inst. 56.  
2 Inst. 39.  
2 Lev. 69.  
3 Keb. 72.  
1 Mod. 85.



Queen's Jurisdiction, and not to be frightened because it may come in Question in Parliament; and I know nothing to hinder us from judging of Matters depending on Charter or Prescription: He concluded for the Plaintiff.

Here Judgment being given for the Defendant, contrary to the Opinion of the Chief Justice; on a Writ of Error afterwards brought in the House of Lords, the Judgment was reversed by a great Majority of the Lords, who concurred with Holt C. J.

The Queen *versus* Paty & al'. Mich. 3 Ann.

( 4. )  
2 Salk. 503,  
504.

ON a Writ of Habeas Corpus, the Defendants, who had been committed to Newgate by the House of Commons, were brought into Court; and the Cause of their Commitment was returned to be, for having commenced and prosecuted an Action at Law against the Constables of Ailesbury, for refusing their Votes in the Election of Members of Parliament, in Contempt of the Jurisdiction, and Breach of the Privileges of the House of Commons. The Counsel for the Defendants, prayed that they might be discharged for several Reasons; and for that they had done no unlawful Act, &c. But three of the Judges opposed it, and said, that the House of Commons were the proper Judges of their own Privileges, &c.

1 Mod. 145.  
2 Lev. 114.  
Moor 67.  
1 Roll. 903.  
Dyer 275.

Holt C. J. I am of Opinion, that the Prosecution of the Suit is lawful, and no Breach of the Privilege of that House; nor can their Judgment make it so, or conclude this Court from determining contrary; and when the House of Commons exceed their legal Bounds and Authority, their Acts are wrongful, and cannot be justified more than the Acts of private Men: There is no Question but their Authority is from the Law, and as it is circumscribed, so it may be exceeded. If we should say, they are Judges of their Privilege and their own Authority, and no Body else, that would make their Privileges as they would have them: In such Case, if there be a wrongful Imprisonment by the House of Commons, what Court shall deliver the Party? Shall we then say there is no Redress? and that we are not able to execute those Laws, on which the Liberty of the Subject depends? It is true, all Courts are so far Judges of their own Privileges, that they may punish for Contempts; but to make any Court final Judges of them, exclusive of every other Jurisdiction, is to introduce a

State of Confusion, by making every Man a Judge in his own Cause.

It was here a Doubt, whether any Writ of Error lay upon a Judgment given on a Habeas Corpus? This Case went into the House of Lords, where it occasioned great Debates between the two Houses of Parliament; but the Parliament being soon after prorogued, the Dispute was dropped.

The Jurisdiction of the Lords in Parliament. See Peers.

## P A R S O N.

Turton *versus* Rignolds. Mich. 12 W. 3.

**A** Legacy of fifty Pounds per Annum was left as a Maintenance for a Parson to preach once a Week in the Parish Church of B. he was to be chosen and removed by the Majority of the Parishioners. They chose one R. the Church-wardens refused to open the Church to him; whereupon he libelled against them in the Spiritual Court; and a Prohibition was granted, for that he did not shew he had a License from the Parson, in whom the Freehold of the Church is, and without whose Consent none can preach there. It is true, it may be an Ecclesiastical Offence for Church-wardens to shut out the Parson, or any other appointed by him to preach in the Church, yet it cannot be so, not to open the Church for one appointed by a Stranger, unless he has the Parson's License; and you should have shewed in your Libel, that you had such a License.

Cases W. 4.  
433.

Holt C. J. was of Opinion, if the Ordinary had appointed one to preach in such a Church, yet he could not justify doing it, without Consent of the Parson. And if a Person give a Charity to a certain Clerk for preaching in such a Parish, he must do it by the Consent of the Parson.

Holt C. J. further said, that let a Parson be ever so orthodox and able, yet he is punishable for his Presumption, if he preach without License of the Ordinary; but the Ordinary *ex debito justitiæ* ought to give such License to one that

that is fit; but if he does refuse, no Mandamus will lie, but his Remedy is to appeal.

Term. Mich.  
12 W. 3.  
Cases W. 3.  
420.

Holt C. J. If a Person preach in a Parish Church, without Leave of the Parson, he is a Trespasser.

## Pawn-Brokers.

*Coggs versus Bernard.* Trin. 2 Ann.

3 Salk. 261,  
269.

Lit. Rep. 332.  
4 Rep. 38.  
1 Inst. 89.  
Yelv. 178.  
2 Cro. 224.  
Owen 124.

**I**N this Case of Pawns and Pledges, it was ruled by Holt C. J. That a Pawnee of any Pawn or Pledge hath a Property in it; for the Thing deposited is a Security to him, that he shall be repaid the Money lent on it. And if Things will not be the worse, as Jewels, &c. he may use them; but then it must be at his Peril, for if the Pawnee is robbed, he is liable to the Pawner, because it was the using of the Pawn that occasioned the Loss of it. In Case a Pawn is of such a Nature, that the Keeping is a Charge to the Pawnee, as a Cow, or an Horse, he may milk the one, or ride the other; and this is as a Recompence for his Keeping. But if the Thing pawned may be the worse for using, as Clothes, &c. the Pawnee cannot use them. If the Pawn be laid up, and the Pawnee robbed thereof, he is not answerable: It is true, he is bound to restore it upon Payment of the Debt, but if his Care in keeping it be exact, and the Pawn is lost, he shall be excused. And here the Pawnee hath still his Remedy for the Money against the Pawner; for the Law requires nothing extraordinary of the Pawnee, but only that he should take an ordinary Care for restoring the Goods. Therefore if a Pawn be lost before Tender of the Money, the Pawnee shall not be liable, unless there was an apparent Default in him; but if after Tender, the Pawnee keeps the Goods, and they are stolen, the Pawnee must answer, because now his Property is determined, and he is a wrongful Detainer; and he that detains Goods by Wrong, is answerable for them in all Events.

3 Bulst. 17.

A Man pawns Goods for Money lent, and afterwards a Judgment is had against the Pawner, at the Suit of one of  
his



his Creditors, the Goods in the Hands of the Pawnee shall not be taken in Execution upon this Judgment, until the Honey is paid to such Pawnee, because he had a qualified Property in them. Where a Pawnee refuses, upon Tender of the Honey, to re-deliver the Goods, he may be indicted; for being secretly pawned, it may be impossible for the Pawnee to prove a Delivery in Action of Trover, for Want of Witnesses.

3 Salk. 268.

2 Salk. 522.

## P E C U L I A R S.

Trail *versus* Edwards. Mich. 3 Ann.

**A** Citation was in a Consistory Court, and Prohibition moved for, suggesting that the Church where, &c. was within such a Peculiar, and consequently not within the Jurisdiction of the Consistory Court.

Mod. Cat.

308.

Holt C. J. All Peculiars are not inferior to the Ordinary of the Diocese in which they are; such as are not so, cannot transmit any Cause to the Ordinary, for that must always be to the immediate Superior; and the Remission of the Cause ought to be to that Jurisdiction to which the Appeal would lie, in Case it had not been remitted. The Dean and Chapter of Salisbury have a large Peculiar within the Limits of the Diocese, but entirely out of the Jurisdiction of it; and the peculiar Jurisdiction of an Archdeacon is not properly a Peculiar, but rather a subordinate Jurisdiction. A Peculiar *prima facie* is to be understood of him that has co-ordinate Jurisdiction with the Bishop; and therefore to determine what Sort of Peculiar this is, would be improper upon Motion; but if the Suggestion had been right, it were fit for a Prohibition, and the Matter to come in Debate on the Declaration therein.

1 Cro. 340.

3 Cro. 102.

3 Lev. 193.

## Peers and Peerage.

The King and Queen *versus* Knollys. Trin.  
6 W. & M.

Skin. 517,  
518, 520,  
522, 524,  
526, &c.

**C**harles Knollys Earl of Banbury, was indicted for the Murder of Captain Lawson, by the Name of Charles Knollys Esq; and this Indictment was removed into B. R. and there the Defendant pleaded in Abatement, that William Knollys, Viscount Wallingford, by Letters Patent under the Great Seal of England, bearing Date, &c. which he produced in Court, was created Earl of Banbury, to hold to him and the Heirs Male of his Body; that William had Issue Nicholas, who succeeded him in the said Title, and that the said Honour descended to him the Defendant from the said Nicholas, as Son and Heir, &c. It was replied, that 14 Decemb. 4 W. & M. the said Defendant petitioned the Lords in Parliament, to be tried by his Peers; upon which the Lords by an Order of their House, disallowed his Right of Peerage, and dismissed the Petition. To this Replication the Defendant demurred, and the Attorney General joined in Demurrer.

Holt C. J. who in this Case, as well as many others, delivered his Opinion with greater Reason, Courage and Authority than the Rest of the Justices, held, That the Plea of the Defendant, containing a Title to this Earldom, first by Letters Patent, secondly by Discent, was a good Plea, and that the Replication had not avoided it. Now an Earldom anciently consisted in the Style or Dignity of the Peer on whom conferred; in his Office belonging to it; and in his Estate, Possessions, or Revenues. As to the first, his Dignity, viz. the Honour and Nobility, that was annexed to his Blood, and inherent in the Person, and was always acquired by Letters Patent. Secondly, for the Office of Earls, they are Comites, not à Comitatu, but à Regem comitando, being Counsellors to the King, and for the Nature of their eminent Dignity, Conciliarii Nati; and they ought to be ever ready to counsel and assist the King about the arduous Affairs of the Kingdom. Thirdly, their Possessions or Revenue; and these were formerly either Lands or Rents, which were annexed to Earl-

Earldoms upon the Creation, for the Support of the Honour and Dignity; but now no Land or Revenue is annexed to the Dignity, but usually a Rent is mentioned in the Patent to be given by the King. And these are the Particulars of which an Earldom consists at this Day; so that though no Possessions are annexed to the Earldom, or the Name of his Dignity be from a Place out of the Realm, and no Man can shew any such Place, it is a good Dignity: The Earldom consisting only in the Dignity, inherent to his Person and Blood, and to his Office, and the Name is only added as a Distinction, in the Place of a Surname; and therefore it is not of Necessity to have any Place of such Name, or that it be within this Kingdom. A Peer or no Peer, is triable by the Record; for no Person can be a Peer without Matter of Record, and it ought to be either by Letters Patent under the Great Seal, which is the more common Way at this Time, and by which the Patentee is ennobled immediate, though he had never sat in Parliament; or by Writ, by which the Party is not ennobled, till he hath sat in Parliament, and the which is countermandable by Death, or by the King by Superedeas before the Sitting in Parliament: But in both these Cases, his Nobility commences by Matter of Record; and when a Man pleads any such Matter, he ought to shew a Record of it, i. e. shew the Letters Patent of his Creation; or otherwise produce some Writ on Record, by which he or his Ancestors, under whom he claims, have been created Peers, or summoned and sat in Parliament. Thus the Defendant here has made a good Title to the Earldom, by shewing the Letters Patent under which he claims, the which is not avoided by the Replication; because it does not shew any Determination in Parliament, and this is an original Cause, and no Judgment is given, nor was the Cause ever before them. For first, this Order is not any Determination, because it is by the Lords Spiritual and Temporal only, and the Parliament consists of the King, the Lords Spiritual and Temporal, and the Commons; so that the King being a Part of the Parliament, nothing may be done there as a Parliament where he is excluded: And every one knows, that the Lords of Parliament have a double Capacity, as an House when they deliberate and consult, and vote in Matters before them, in the Way of Legislature or Matter of Privilege; and when they proceed as a Court in a judicial Manner, for rectifying the Errors of inferior Courts; and as a Court, all that they do is by the Authority

39 Ed. 3. 39.

6 Rep. 33.

2 Inst. 665,

666.

31 Ed. 3



rity of the King, and the Style ought to be, *Coram Rege* in Parlamento, &c. And any such Judgment as this by the Lords Spiritual and Temporal was never seen, nor can any Precedent be produced for it; for the King is the Fountain of Justice, and no Man may proceed in the Administration of it, but in his Name, or under his Authority. Secondly, This is an original Cause, of which the Lords have not Cognisance, and therefore the Proceedings are *coram non judice*; for a Thing is as well out of the Jurisdiction of a Court, where it comes there before its Time, as where it is beneath it: And they have not Jurisdiction of any original Cause for this Reason, because they are the most supreme Court, and employed *circa ardua Regni*, and ought not to be troubled with little Causes, but only upon Necessity, where a Failure of Justice is in the inferior Courts; for all Causes generally consist more of Matters of Fact, than of Law; and it is below the Dignity of their Lordships to trouble themselves with such Matters; not that the Law does not deem but the Lords are able to examine any Matter of Fact, but for that another Way more fit is appointed to be used in this Case, the which is by a Jury. Also the Lords in Parliament are the Dernier Resort, and are to redress the Errors of all other Courts; therefore a Cause shall not come there in the first Instance; for this would deprive the Subject of his Remedy by way of Appeal, or Writ of Error; and it is the Wisdom of this Nation, and I believe all Nations, to give to the Party an Appeal, and not to conclude his Right upon the first Trial. Thirdly, The Lords have not given any Judgment in the Case, for it is only, that he has not a Right to the Earldom, which is but an Opinion, and no Judgment. It is true, in Courts of Equity, the Dismissal of the Bill is the Determination of the Cause; but in a Proceeding at Law, if a Court declares that the Party hath no Right to recover, or says that the Defendant eat inde sine die; yet this is not a Judgment against the Plaintiff, but would be erroneous, without saying, *Nil capiat per Billam*: And so in a *Quo Warranto*, it is not sufficient to adjudge, that the Party has not a Right to a Thing which he has usurped, but he ought to be concluded from it by Judgment. Fourthly, the Lords had not any Cause before them; this was only a Petition of the Defendant to be tried by his Peers, the which is a Matter of Privilege, of which they have Cognisance; but the Right of Earldom never was before them, or submitted to their Judgment; his Petition asserts him to be an Earl,

2 Cro. 284.

he does not put that in Question before the Lords, and therefore their Sentence is more than they had before them to determine. He demanded to be tried by his Peers, and asserts himself to be a Peer; and they answer, that he has not a Right to the Earldom of B. which is a Thing out of the Petition, and of which the Lords had not any Jurisdiction. Here the Earldom is an Inheritance, and the Inheritances of Peers in their Honours, are determinable by the same Law, and in the same Manner, as those in their Lands; and the House of Lords hath not, nor ever had any Authority to determine of them: For though they have determined Matters of Privilege and Precedency, the Inheritance of a Peer never was determined by them, but is determinable according to the Course of the Common Law, like all other Inheritances. As to the Law and Custom of Parliament for the Determination of Inheritances, I know not any but the Common Law of England, which is the Birthright of every Englishman; and every Law, which binds the Subjects of this Realm, ought to be either by the Common Law and Usage of the Realm, or Act of Parliament; therefore the Defendant cannot be ousted of his Dignity, but by Attainder, or Act of Parliament, or Judgment in a Scire facias brought upon his Patent. But if there was any such Law and Custom of Parliament, yet when this comes incidentally in Question before us, we ought to intermeddle with it; and we adjudge Things of as high a Nature every Day, for we construe and expound Acts of Parliament; we discharge Persons committed by Parliament upon a Prorogation; we adjudge of Privilege of Parliament, &c. And herein we do but go in the Steps of our Predecessors; for we sit here to administer Justice according to the Law of the Land, and ought not to regard any Thing but the Discharge of our Duty. And as the Lords in this Case have not given any Judgment, by which the Defendant shall be barred or excluded from his Peerage; and he having made a good Title in his Plea, which is not answered by the Replication, it appears that he is a Peer, and ought to be indicted by his proper Name, Charles Earl of B. and being indicted by the Name of Charles Knollys Esq; this is a Misnomer, for which the Indictment ought to be abated; and accordingly it was abated, and Judgment given for the Defendant.

Eyre J. said, The Defendant had a Title to his Honour by legal Conveyance, and that it was under the Protection of the Common Law, and therefore could not be taken

Caf. Parl.  
2, 3, &c.

from him but by legal Means: That the House of Lords could no more deprive one of Peerage, than they could confer a Peerage; and the Defendant's Right stood upon the Letters Patent and his Legitimacy; that the Letters Patent could not be cancelled without a Scire facias, nor the Defendant be now proved a Bastard or illegitimate. The other Justices argued to the same Purpose; and it was said, that the Lords are publick Persons, in whom all the Subjects have an Interest; therefore they cannot alien or extinguish their Inheritance in their Peerage, which may not be taken away without Consent of the King, and by Act of Parliament: And the Lords can only do that, which they may do by Law; and if they exceed their Authority, their Proceedings are void; and of a Thing that is void, every Man may take Advantage.

Seld. 536.  
4 Inst. 355.  
Staundf. Pro-  
rog. 72.

Before the Time of R. Ed. 3. there were but two Titles of Peers and Nobility in England, viz. Earls and Barons; and the Titles of Dukes, Marquesses, and Viscounts, were not then in use, but are of a later Date. The Barons were originally created by Tenure, afterwards by Writ, and last of all by Patent. And if a Patentee be generally disturbed of his Peerage, the regular Course is to petition the King, who indorses it, and sends it into the Chancery.

## P E R J U R Y.

The King and Queen *versus* Taylor. Mich.  
5 W. & M.

( 1. )  
Skin. 403.

**O**N an Indictment of Perjury, it appeared to be committed in an Affidavit, to which some Exceptions were made.

Holt C. J. Although the Perjury be assigned in an Affidavit made at Serjeants-Inn, it is good if it be in Cheapside, or any other Place within the same County: But it ought to be proved, that the Affidavit was read, and used against the Party, for the bare making, without using it, is not sufficient. And where an Affidavit cannot be read in Evidence, yet if the Person who makes it be sworn as



a Witness, his own Affidavit may be produced against him, to shew wherein he contradicts himself.

The King *versus* Greep. Mich. 9 W. 3.

THE Defendant was indicted for Perjury, in giving Evidence for the Earl of Montague, in the great Cause between him and the Earl of Bath, concerning the Duke of Albemarle's Estate; the Perjury was for swearing a Witness to a Deed was, at the Time of executing it, a hundred Miles off from the Place alledged; but being too generally assigned, Motion was made in Arrest of Judgment.

Holt C. J. It is here said by my Brother Eyre, that the Matter, in which the Perjury is assigned, is immaterial to the Issue, and therefore no Perjury punishable by Indictment: But I hold it is Perjury to swear falsely in any Circumstance which conduceth to the Issue, or to the Discovery of the Truth; though if it be only in some impertinent or minute Circumstance, as where the Witness dined such a Day, &c. which is usual amongst the Vulgar in giving Evidence, it is not Perjury, because this doth not conduce to the Issue, or to the Truth of the Matter to be tried. If the Credit of a Witness is in Question, and another Person to support it swears falsely, it is Perjury; and the same Certainty is required in an Indictment at Common Law, as upon the Statute 5 Eliz. because that Act doth not make any Thing Perjury, which was not so before. It is true, if a Man is convicted of Perjury at Common Law, the King may pardon him, but he cannot if on the Statute.

This Judgment was arrested, and entered of Record, and a Writ of Error brought in the House of Lords, where it was reversed, and the Defendant taken, &c.

The King *versus* Melling. Trin. 9 W. 3.

HE was found Guilty of Perjury at a Trial at Bar; but the Jury did not find it wilful and corrupt Perjury, as laid in the Information: Whereupon a new Trial was moved for, because the Verdict was against Evidence, &c.

By Holt C. J. & Cur': When a Cause is tried at Bar, a new Trial is never granted for the single Reason, that the

(2.)  
Carthew  
521, 422.

3 Inst. 164.  
1 Cro. 352.  
Hertl. 97.  
3 Cro. 46,  
426.  
2 Leon. 201.

(3.)  
5 Mod. 348,  
351.

3 Keb. 555.  
Style 462.

the Jury went against Evidence; tho' it has been allowed, where there was a Misbehaviour in the Jury, &c. But they held here, if the Thing sworn was manifestly false, the Mind must be corrupt, and then there need be no Evidence of Bribery.

Shore *versus* Meddison. Trin. 9 W. 3.

(4.)  
Com. 449,  
450.

Per Holt C. J. **A** Man cannot be guilty of Subornation of Perjury, unless Perjury be actually committed; but I have known one set in the Pillory for endeavouring to suborn, it being a great Offence. Vide 2 Show. 1, 2.

See Evidence.

## P H Y S I C I A N S.

Groenvelt *versus* Burnell & al'. Pasch. vel Mich.  
9 W. 3.

Carthew 491,  
&c.

**I**n an Action of Assault and Battery, and False Imprisonment brought against the Defendants, who were Censors of the College of Physicians, and against Cole their Officer, who served their Warrant, &c.

The Defendants plead, as to the Battery & totum residuum transgressionis prædictæ. præter the False Imprisonment, Not guilty; and as to the Imprisonment they justify, by Virtue of their Charter confirmed by Act of Parliament; and by the Statute 14 H. 8. by which they have Power to fine and imprison pro non bene utendo facultate medicinæ; then they set forth, that the Plaintiff, at such a Time and Place, had administered unwholesome Medicines to A. B. and so justify the Taking and Imprisoning pro mala praxi, &c.

Holt C. J. delivered the Opinion of the Court; the Plea is good, because the Defendants have thereby sufficiently shewed their Authority over the Person of the Plaintiff, and they have shewed the Fact, for which he was punished, to be within their Jurisdiction as Censors; which

Faã is not traverfable in this collateral Añion, becaufe the Cenfors are made Judges to hear and determine; and therefore they are not liable to an Añion for what they do by Virtue of their Judicial Power. Where-ever a Statute gives a Power to fine and imprifon, the Perfons to whom fuch Power is given are \* Judges of Record, and their Court is a Court of Record.

\* Per Holt  
C. J. As to  
that Point in

Dr. Bonham's Cafe, 'tis not Law, but only an Opinion delivered, and not a Refolution.  
8 Rep. 38. 2 Infl. 308, 332. 208. 27 Affife, placito 18.

In Doctor Bonham's Cafe, they imprifoned him for practifing Phyfick without a Licence; which they could not do by the Statute, but they ought to fue for the Penalty of five Pounds per Month, qui tam, &c. but in this Cafe of Mala praxis they have Power to commit.

'Tis true, no Writ of Error will lie upon this Judgment, becaufe 'tis a Court instituted de novo, and by the Institution they are not bound to draw up their Judgments with Ideo confideratum, &c. but 'tis fufficient to fhew the Conviction in other Words.

And yet the Party is not without Remedy, for he may remove this Conviction into B. R. where it may be quafhed for Infufficiency; and this may be done by Certiorari to any new conftituted Jurifdiction of Record, becaufe B. R. hath a Power to keep all limited Jurifdiction within their proper Bounds.

3 Cro. 309,  
489.

But if the Plaintiff had not a Remedy, it doth not follow that the Faã, upon which this Conviction is grounded, fhould be traverfable in a collateral Añion, becaufe the Power, which the Cenfors have, is given to them by Statute, by which they are to try the Faã, whether the Praxis is good, or not.

Laftly, If the Mala praxis was traverfable, yet this Plea is fufficient, becaufe 'tis not neceffary to fet forth the Particulars of the Medicines; for this Court can make no Judgment, whether they were wholefome, or not; and the Defendants have alledged, that the Medicines were unwholefome.

And as to the Objection concerning the Assault, that is included in the tot. reliduum transgreffionis, and answered by the Juftification of the Taking and Imprifonment.

Judgment for the Defendants.



## PLAY-HOUSES.

*Case of Betterton & al'. Mich. 7 W. 3.*

3 Mod. 142.

**A** Prohibitory Writ was issued to the new Players, Betterton and others, who had erected a Play-house in Lincolns-Inn Fields; the Writ recited, that it was a Nuisance to the Neighbourhood, and therefore prohibited them to continue it: But the Players not obeying this Writ, the Court granted an Attachment, &c. It was here insisted by Counsel, that no such Writ could be, for the Parties had no Way to defend themselves; and the proper Method was to proceed by Indictment.

Holt C. J. You are not concluded by this Writ, as to the Right; but you may come in and plead to the Attachment the General Issue, and if the Thing be no Nuisance, it is no Fault or Contempt to continue it: And Play-houses are not in their own Nature Nuisances; but only as they draw together great Numbers of People and Coaches, and Sharpers thither, which prove generally inconvenient to the Places adjacent. And in this Case, the Prosecution is carried on by the Patentees of the Old Playhouse, and not by the Inhabitants of the Place; which shews they do not think it a Nuisance, if it be one.

1 Mod. 76.

There was a Case in this Court of Jacob Hall the Rope-dancer, where the Court sent such a Writ as this was here, and made him pull down his Stage: But that was a Nuisance in it self.

Pasch. 1 Ann.  
Fagrell. 17.

In an Information against the Players of the New Playhouse, for adding profane and lewd Plays; they being bound by Recognizance to try it, made up the Record wrong, viz. Lincolns Fields, for Lincolns-Inn Fields, thinking to be acquitted upon that Variance.

By Holt C. J. Let the Matter be found specially, and Mr. Attorney may move to have their Recognizance estreated.

## Pleas and Pleadings.

Bradburn *versus* Kennerdale. Mich. 4 Jac. 2.  
Rot. 640.

**E**RROR of a Judgment in the County Palatine of Chester, in Replevin brought for the Taking a Cow in a Place called Shippen. (1.) Carthew 164, 165, 166. 3 Mod. 318.

The Defendant made Conusance as Bailiff to Sir Peter Warburton, for that he (Sir Peter) tempore quo, &c. was seised of the Manor of Asley, (of which the Place where, &c. is, and Time out of Mind was Parcel), in his Demesne as of Fee, &c. and that he the Defendant, as Bailiff, &c. took the Cow, &c. Damage-feasant.

The Plaintiff replied in Bar to the Conusance, that bene & verum est, that Sir Peter Warburton, tempore quo, &c. was seised of the Manor of Asley aforesaid, in dominico suo ut de feodo, sed diu ante prædict. tempus quo, &c. Sir George Warburton was seised in Fee of the said Manor (whose Heir the said Sir Peter Warburton is), and of a Messuage adtunc parcell. ejusdem Manerii, of which Messuage the Place where, &c. tunc & adhuc est parcell. and being so seised, the said Sir George, before the Taking the said Cow, (viz.) on such a Day, made a Lease of the said Messuage, unde, &c. to one T. S. for three Lives, and that afterwards T. S. died, and T. B. entered, and was seised as Occupant, and made a Lease for one Year unto the Plaintiff, &c. per quod, &c.

To this Replication there was a Demurer in this Form:  
¶ Quod placitum præd. superius replicando placitat. minus sufficien. &c. and concludes unde petit judicium & damna sua, &c. but did not pray any Return; and Judgment was there given for the Abowant; and that he should have a Return, &c. and that for a Fault in the Bar, which was the Want of a Traverse.

It was adjudged that the Bar was ill for Want of a Traverse; that the Place where was Parcel of the Manor tempore Captionis; for tho' the Reversion of the Locus in quo remained Parcel of the Manor, after the Demise for three Lives; yet the Place it self, and the Freehold were severed by

28 H. 6. 5.  
1 Bullt. 48.  
Dyer 134.  
Bro. Com-  
promise, pl.  
79.  
1 Cro. 494.

W. Jones  
402, 492.  
Owen 51.

by the Demise, and not Parcel of the Manor tempore quo, &c.

2 Bullf. 226.  
1 Roll. 264.  
Long Quinto  
Ed. 4. 100.  
Hob. 81.  
2 Vent. 212.

It was held, that the Default of a necessary Traverse is Substance, and not aided by a General Demurrer; likewise if a Traverse is short of the Matter traversable, this is Substance; but where a Traverse is merely Surplusage, and not necessary; that is merely Form, and aided upon a General Demurrer.

Holt C. J. held the Title under the Occupant was good; for the Statute 29 Car. 2. cap. 3. did not take away all Occupancy, but transferred it to Executors; and he held that B. the Lessor of the Plaintiff, was Executor de son tort by his Entry on the Lands, because the aforesaid Statute made it Assets.

The Judgment was affirmed.

Fitzpatrick *versus* Robinson. Pasch. 1 W. & M.

(2.)  
Com. 107,  
108.  
1 Show. 1.

**D**EBT on Bond for Performance of Covenants; one of which was, That one Price should, before such a Day, pay the Plaintiff 1200l. and that he should render a just and true Account of all such Profits, Advantages, &c. as should arise from such an Office, between the 25th of March 85. and the 25th of March 86. The Defendant pleads Performance generally; Plaintiff replied, quod non dedit verum & justum computum; Defendant demurs.

Thompson pro Defendente.

The Replication is double; for he should have said, either that he had made no Account, or that he had made one; but it was not true and just; and he cited one Vere's Case, of which he had a Report.

Tremain pro Quer'.

The Plea is ill; for one of the Covenants being to be performed by a Stranger, he ought to shew how he had performed it, and not generally, &c. (and of such Opinion was Holt C. J. on the first Day,) and then the Plaintiff ought to have Judgment, unless it appears that he hath no Cause of Action. 8 Co. Turner's Case; yet here the Replication is good, because we have pursued the Words of the Covenant. Yelv. 33, 40. But per Cur', that is in a Declaration, and in an Assumpsit also.

At another Day Holt C. J. said, That (Verum & justum debitum) is good Pleading, and in Account plene computavit



vit is a good Issue, and the Case 2 Roll. 9. comes up to this Case.

Dolben agreed, and that the Case in Yelv. Hayward and Reeves, is a stronger Case.

Judgment pro Quer'.

Calvert *versus* Prior. Pasch. 1 W. & M.

**S**Cire facias, by the Plaintiff as Administrator de bonis non, and sets forth, That one Tremnier, the Testator, recovered a Judgment against the Defendant (such a Day and Year) and after made J. S. his Executor, and died, J. S. dies, not having administered, &c. and Administration de bonis non, &c. was granted to him. The Defendant pleads, quod executionem non, quia dicit, that the said Tremnier made J. S. and J. D. his Executors, and that J. D. is yet alive; unde petit Judicium, & quod breve præd. cassetur: The Plaintiff replies, cassari non, quia dicit, quod præd. Tremnier made J. S. his only Executor; absq; hoc, that he made J. S. and J. D. his Executors; Et hoc petit quod Inquiratur per patriam; to which the Defendant demurs generally. (3.) Com. 106, 107.

It was objected, That the Replication ought to conclude, Et hoc paratus est verificare, and not to the Country.

But it was answered, that here is an express Affirmative, and Negative; and altho' it be informal, it is good in Substance, and aided by the General Demurrer.

Another Question was moved, whether this be a Plea in Bar, or in Abatement (for 'tis ill in Bar)?

Holt C. J. cited 36 H. 6. 18. That a Plea which begins in Bar, and concludes in Abatement, is a Plea in Abatement, and vice versa; and if it should not be so, yet the Plaintiff hath made it so, by replying cassari non. Mo. 692. Onely's Case agrees: Wherefore Judgment quod respond. ouster. 2 Mod. 63, 64. 1 Mod. 214.

Chettle *versus* Lees. Trin. 1 W. & M. Rot. 107.

**I**N Trespass for Breaking his Close, &c. the Declaration was of Easter-Term last past, which began on the 17th Day of April, and the Trespass was laid to be done in October before, (viz. in the 4th Year of King James II.) per quod he lost the Profits of his Lands to the first Day of (4.) Carthew 95, 96. 4 Mod. 6. S. C.

6 Y

May

May ensuing, (which was after the Beginning of Easter-Term,) to which the Declaration did relate, so that the Per quod did extend to a Time after the Commencement of the Action, and the Declaration concluded *Contra pacem nuper Dom. Regis & Dom. Regis nunc, &c.*

The Defendant pleaded a frivolous Bar, to which the Plaintiff demurred; and it was insisted for the Defendant, that the Declaration was ill, for that the Plaintiff had declared for Damages unto a Time after the Action commenced, and had concluded his Declaration ill; for it should be *Contra pacem nuper Domini Regis only.* 2 Cro. 377.

On the other Side it was said, that the Default in the Per quod, and also the Conclusion of the Declaration, (viz.) *Contra pacem Domini Regis nunc,* were Surplusage, and therefore shall not vitiate the Declaration. See 2 Cro. 377. in Point.

Holt C. J. Told the Defendant's Counsel, that they came too soon for the first Exception, because the Jury might cure that Fault by a separate Verdict, (viz.) quoad the Trespass in the Month of October to the 17th of April, they assess Damages to so much, and the Plaintiff might release the Residue; but if the Verdict had been General, this would have been a good Exception afterwards; and the Court held that Clause, *Contra pacem Domini Regis nunc,* merely Surplusage, and therefore shall not prejudice that Matter, which without it was sufficient.

The Plaintiff had Judgment, the Bar being frivolous.

### Skinner *versus* Kilby. Trin. 1 W. & M.

(5.)  
Carthew 87,  
88, 89.

**I**N an Action of Covenant upon a Lease for Years of a Mill, rendring Rent, the Breaches following were assigned.

1. The Plaintiff in Fact saith, that 20l. for the Rent of the Premises for seven Years, ended at such a Day, were in arrear, and not paid to the Plaintiff.

2. Another Breach was, that the Defendant had permitted the Mill to be uncovered, and out of Repair.

3. The Third was, for that the Defendant had not delivered up the Premises to the Plaintiff, at the End of the Term, *secundum formam Indenturæ.*

The Defendant pleaded as to the first Breach, that he from Time to Time, at the several Days of Payment, had paid the Rent to the Plaintiff; *Et hoc paratus est verificare.*

And as to the Repairing, he pleaded, that it was sufficiently in Repair, and concludes likewise as before, Et hoc paratus est verificare.

And as to the not yielding up the Possession, he pleaded, that before the End of the Term, (viz.) on such a Day, quidam T. S. habens bonum jus & titulum ad molendinum prædict. in & super molendinum prædict. intravit, & ipsum (the Defendant) a possessione inde expulit & amovit, & adhuc extratenet; & hoc similiter paratus est verificare, unde petit judicium si, &c.

And upon a General Demurrer to this Plea it was objected, that it was ill for two Causes; 1. Because the Defendant had pleaded, that he paid the Rent, which is a direct Affirmative to the Negative in the Declaration, &c. and so as to the Repairs, &c. that the Mill was in Repair, which is a direct Affirmative to the Negative in the Declaration; and therefore the Defendant ought to have concluded to the Country, and not in Bar to the Action with Hoc paratus est verificare.

Then the Pleading the Expulsion in Form, as aforesaid, is ill, (viz.) quod T. S. habens bonum jus & titulum intravit, &c. which is too general, incertain and insufficient; he ought to shew, that T. S. had a Title paramount and superior to the Lessor; for he might have a good Title under the Defendant himself, by Assignment of the Term, and therefore that can be no good Cause of Exclusion. 2 Lev. 37. 3 Lev. 325. Lib. 4. 80. Noke's Case.

For the Reasons and Defects, ut supra, the Court held the Plea to be ill in Substance, and therefore Advantage might be taken upon it on a General Demurrer.

Judgment for the Plaintiff.

Trevilian *versus* Seacomb. Mich. 1 W. & M.

Several Outlawries were pleaded in Abatement; upon which the Plaintiff demurred. (6.)

This Plea is good; for altho' a Man cannot plead double Pleas in Bar, yet he may plead several dilatory Pleas. 1 Inst. 304.

Holt C. J. That Book is to be intended of several Dilatories at several Times, and one after another, but not at the same Time; but Tremain cited Vaughan's Case, Pasch. 25 Car. 2. B. R. Rot. 25. That several Outlawries may be pleaded at the same Time; but per Cur', the Plea is ill, for

Com. 162.  
1 Show. 80.



for the Doubtless; and Judgment was given for the Plaintiff, nisi, &c.

Nota; Ch. J. said, It was not necessary to plead an Outlawry to be under Seal; for it was sufficient, if it be produced under Seal.

Brooks *versus* Webster. Mich. 1 W. & M.

( 7. )  
Com. 138.

CASE for stopping a Way, and declares, that he was possessed of two antient Messuages, &c. and that he had a Way leading to them, and that they were burn'd; and that he had erected a new House super quamdam partem eorundum Messuagiorum. Verdict for the Plaintiff. It was moved in Arrest of Judgment, that it could not be upon Part of the said Messuages; for he had shewn before that they were burnt. To which it was answered, that the Ground is Part of the Messuage; and so it shall be intended, that he built upon the Ground; to which the other Side replied, that that Intendment will not consist with what was said before; for then the same Words must have two Intendments.

Holt C. J. This would have been bad upon a Special Demurrer; but Cur' were of Opinion, that it was good after Verdict.

Judgment pro Quer'.

Meredith *versus* Allen. Pasch. 2 W. & M.

( 8. )  
1 Show. 148.

DEBT on a Bond; the Defendant craves Oyer of the Condition, and (it being a Bottomree Bond) pleads that the Ship was lost. The Plaintiff replies 'twas not lost; Et hoc petit quod inquiratur per patriam.

The Defendant demurs, and shews for Cause, that no Breach was assigned in the Replication; and 'twas argued that 'twas ill; for that the Condition was to pay Money; and now upon Oyer the Condition was become Part of the Declaration; and then upon the Plaintiff's Declaration, there is no Cause of Action without Breach of the Condition in the Replication. And 'twas agreed, that after Verdict it might be help'd, for there it should be intended the Money was not paid: But here 'twas upon Demurrer. The Case of Hayman and Gerald, Mich. 19 Car. 2. in this Court, in Saunders and Sid. But Dolbin said, that Judgment

ment was disapproved at that Time, and 'twas not Law, and Saunders answers it in his Reporting of it.

And Holt C. J. said, the true Difference is, where the Matter pleaded admits and supposes a Non-performance, there is no Need to alledge a Breach; and so Judgment was given for the Plaintiff.

Kemp *versus* Andrews. Hill. 2 W. & M.

**P**Lainiff declares, pro eo quod he and one J. N. and J. P. now deceased, whom the Plaintiff survived, were in the Life-time of the said J. N. possessed as of their proper Goods and Chattels, viz. of a Ship called the Streights Merchant, with its Apparel, and divers other Goods, to the Value of 20,000 l. and being so possessed, did lose them, and they came to the Defendant's Hands by finding, and he in the Life-time of the said, &c. converted them to his own Use. (9.)  
1 Show. 188.

The Defendant venit & defendit vim & injur' quando, &c. actio non, quia dicit quod the Plaintiff & prædict. J. N. and J. P. long before the Times in the Declaration, and the said several Times, &c. were Merchants, and as Joint-Merchants for their common Profit, were possessed of the said Goods, and that by the Law of Merchants, and the Law within the Kingdom of England used and approved, there is not or ever was any Right of Survivorship between Joint-Merchants; That J. N. before the Exhibiting of the Wills died, and made J. D. his Executor, who proved the Will, and is yet living; that J. D. died also, and made R. S. his Executor, who proved his Will, and is yet living; Et hoc parat. est verificare, unde petit jud. si action. &c.

Plaintiff demurs, and shews for Cause, quod placit. attingit ad General. Exit, incert. est & caret forma.

Per Cur': This can never be a good Bar, so that we do not consider whether the Executors must or can join.  
Judgment pro Quer'.

Beake *versus* Kent. Trin. 3 W. & M.

**I**N Indebitatus Assumpsit for Wares sold, against the Defendant as an Executor, he pleaded three Judgments, and no Assets ultra; the Plaintiff replies, that there is so much (16.)  
1 Show. 289,  
290.

much due on each Judgment, and no more, and that he hath Assets beyond these Sums, & sic continuat' per fraudem; the Defendant rejoins generally, that they are all for just Debts; absque hoc, that he permits them, or any of them, to be kept on foot by Fraud: The Plaintiff demurs, for that the Traverse is to all, or any; whereas it should have been severall to each Judgment.

9 Rep.  
Dyer 115.  
3 Cro. 83, 84.

Holt C. J. The Plaintiff hath Liberty of replying to them all severally; you need not aver Fraud to every one, for if to any, it is enough to avoid the Defendant's Bar: Or he might have generally said, the severall Judgments aforesaid were kept on foot by Fraud. In a general Issue, you must say nec eorum aliquem, but in a special Bar, it is not necessary; because if false in part, it is so in the whole. The Case of Wasse in Dyer, for cutting twenty Oaks, is that the Defendant should plead he did not cut them, or any of them; though in Debt on Bond with Condition not to commit Wasse, if the Breach be that he cut so many Timber-Trees, it is sufficient to say, that he did not cut them modo & forma.

In this Case the Court directed the Parties to waive the Demurrer, and try the Honesty of it upon an Issue, &c.

Carvell Executor of Dodsworth *versus* Edwards.  
Trin. 3 W. & M. Rot. 349.

(11.)  
Carthew  
210.

**D**EBT upon Bond, and likewise upon a Judgment due to the Testator Dodsworth.

The Defendant pleaded in Bar Letters of License, under the Hand and Seal of the Testator, which were made between the Defendant and his Creditors, to which the Testator was a Party, reciting, that whereas the Defendant had a Right in such a House, it was thereby agreed, that he should give Power to the Testator to sell the same, and to divide the Money in Proportion amongst the Creditors; and that upon Receipt of such their Proportions, every of the said Creditors should give the Defendant a Release of all Matters, &c. before the Agreement: And it was farther agreed, that in the mean while, and until the said House should be sold, and from thenceforth after, the said William Edwards shall not be sued or prosecuted at Law, or his Person or Goods molested by any of the said Creditors named in the said Articles, or any Thing past, sub poena relictionis



& exonerationis debiti vel debitorum talium personarum, as shall so sue or prosecute, &c.

Per Holt C. J. This is a Defeazance, and no Release; and he cited Moor 811. and the whole Court were of that Opinion; and that it being a good Defeazance, is pleadable in Bar.

See Postea, between Ayloff and Scrimshire, the same Point, N<sup>o</sup> 1. Title Release.

Speak *and* Kent. Mich. 3 W. & M.

**I**N an Indebitatus Assumpsit against an Executor, who pleaded three several Judgments, the Plaintiff made three several Replications; and shews that one was but for such a Sum, and kept on Foot by Covin, &c. To these Replications the Defendant made but one Rejoinder; upon which the Plaintiff demurred, because this deprives him of the Benefit which he might have; for now if he would sur-rejoins, and say, that the several Judgments are kept on foot by Covin, and proves that one only was, and the other not, it would be against him; which the Court denied.

For by Holt C. J. In case of a Special Issue, as in this Case, if Part be found for the Plaintiff, it is well enough. For if the Plea of the Defendant is false in Part, it is false in the Whole. When a Man pleads the General Issue, there all ought to be true, and found for the Defendant, as in Debt, Nihil debet; but in Debt upon an Obligation, with Condition not to do Waste, and a Breach assigned, with succidend' forty Acres, and Issue joined upon it, if the Jury find but ten, it is against the Defendant. The Court directed the Parties to waive the Demurrer, and try the Honesty of the Cause upon an Issue.

Smith *versus* Cudworth. Pasch. 4 W. & M.

**C**ovenant on an Indenture, that in Consideration of 2250 l. to be paid to the Plaintiff, as afterwards mentioned, the Plaintiff covenants to transfer to the Defendant, his Executors, or such as he should appoint, on the 17th of February following, thirty Shares in the Stock of the Linen Corporation; and the said Cudworth covenants, that he, his Executors, Administrators or Assigns, shall accept the same in usual Manner, upon the said 17th Day

(12.)  
Skin. 299.  
(13.)  
1 Show. 390.

Day, and eodem tempore solveret the Money aforesaid. Plaintiff avers, that upon that Day he was ready, and offered to have transferred according to usual Form, and thereof gave the Defendant Notice; that the Defendant did not then accept, nor appoint any Person to accept the same, nor then, nor at any Time afterwards, pay, or cause to be paid, the 2250 l. but the said Stock to accept did then and there refuse. Et sic infregit, &c.

Defendant pleads, That the usual Banner of transferring is by Writing, entered in a Book for that Purpose, kept under the Hand of the Person transferring; and the usual Banner of accepting, is by Writing entered in the same Book after such Transfer, declaring an Acceptance; that the Plaintiff did not transfer, according to that or any other Form, by Reason whereof the Defendant could not accept. Et hoc parat' est verificare. Plaintiff demurs.

Per Cur': The Plea is idle, and the Declaration good. Judgment pro quer'. Vide pro Quer', Bragg and Nightingale's Case, Style 140, 141.

### Hill *versus* Gallop. Pasch. 5 W. & M.

(14.)  
4 Mod. 175.

**T**HE Plaintiff brought an Action on the Case, for a Disturbance in a Common; and declared, that he was possessed of a Messuage and so many Acres of Land, with the Appurtenances in, &c. for a certain Term of Years yet to come and unexpired; and that per totum idem tempus habuisset, & gaudere debuisset communiam pasturæ pro omnibus averiis levan' & cuban', &c.

Upon Not Guilty pleaded, the Plaintiff had a Verdict, and Serjeant Tremaine moved in Arrest of Judgment, because the Plaintiff had not shewn any Title in himself, either by Grant or Prescription. Sed non allocatur.

Holt C. J. This might be a good Exception upon a Demurrer, but it is cured by Verdict.

### Rex *versus* Hebbard. Mich. 5 W. & M.

(15.)  
Cafes W. 3.  
48.

**H**OLT C. J. **I**N Trespass, Assault and Battery, if Defendant in his Plea varies from the Time alleged, he must aver quæ est eadem transgressio; but where he agrees in the Time, he need not.

Combe *versus* Talbot. Mich. 5 W. & M.

**I**N Debt, for two Years Rent due upon the Demise of a (16.)  
 Messuage and several Parcels of Land, rendring 9 l. <sup>1 Salk. 218,</sup>  
 per annum; the Plaintiff demanded 18 l. Defendant, as <sup>219.</sup>  
 to 9 l. parcel inde, being the first Year's Rent, pleaded Nil <sup>4 Mod. 254.</sup>  
 debet, and concluded to the Country; but there was no  
 Joinder in Issue thereupon. And as to the 9 l. Residue, he  
 confessed the Demise as laid in the Declaration, reddendo  
 annuatim 9 l. viz. 40 s. for such a Parcel, and 7 l. for other  
 Parcels. And as to the 40 s. Parcel thereof, he pleaded  
 Nil debet; and as to the rest, Nil habuit in Tenementis. The  
 Plaintiff demurred generally, quia placitum prædict', &c:

Et per Holt C. J. and Eyre (who were only in Court,)  
 1st, One Defendant cannot plead two such Pleas as go to <sup>Far. 148.</sup>  
 the Whole: Thus one Defendant cannot plead Nil debet;  
 and Nil habuit in Tenementis. 2dly, If placitum be nomen  
 collectivum, which was doubted, (Vide 1 Saund. 338: Dyer  
 325. b. 15 H. 7. 10. b. 3 Cro. 139. 1 Leon. 125. 1 Sid. 39.)  
 then the Demurrer goes to all, and then no Judgment <sup>Yelv. 65.</sup>  
 can be given for the Plaintiff, because the Plea of Nil debet <sup>Co. Lit. 303:</sup>  
 is a good Plea. <sup>a. 304. a.</sup>

Leave was had to amend on both Sides.

Countess of Arran *versus* Crispe. Trin. 5 W. & M.

**I**N Debt upon a Bond, the Defendant craved Oyer of the (17.)  
 Condition, which was to perform Covenants in an In- <sup>1 Salk. 221,</sup>  
 denture, one Covenant was to pay so much clear of all <sup>222.</sup>  
 Taxes; and then set forth the Indenture, and pleaded Per-  
 formance. The Plaintiff replied, Non-payment of so much  
 for Half a Year's Rent. The Defendant rejoined, So  
 much paid in Honey, and so much in Taxes, upon the Act  
 of Parliament for laying 4 s. per Pound on Land, which  
 being allowed amounted to the full. The Plaintiff de-  
 murred.

Holt C. J. held the Covenant did not extend to Par-  
 liamentary Taxes, for Want of the Word Parliamentary.  
 Ceteri contra. All Taxes include Parliamentary.

Pet per Holt C. J. Judgment ought to be for the Plain- <sup>1 Sid. 10, 71.</sup>  
 tiff, though the Point of Law were against him, because <sup>Co. Lit. 304.</sup>  
 the Matter of this Rejoinder being by Way of Excuse,  
 7 A ought



ought to have been set forth in Bar, but here it is a Departure; for he said at first, that he had performed the Covenants; now he says, he is not obliged to perform them.  
Judgment pro Quer'.

Pope *versus* St. Leger. Mich. 5 W. & M.

(18.)  
i Lutw. 484.  
Abstra& of  
the Plead-  
ings.

**R**oger Pope Esq; declared in Debt against John St. Leger Esq; that whereas the said St. Leger and Pope, at such a Time and Place, played at Back-Gammon, and the said Pope threw two Fours at a Cast, and thereupon touched, and a little stirred two of his Table-men, but did not move them from off the Point: Thereupon a Wager was laid between the said Pope and St. Leger, that Pope should pay St. Leger 150 Nummos aureos, vocat' Guineas, if Pope was bound to play those two Ben; and that St. Leger should pay Pope 100 Nummos aureos, if Pope was not bound to play those two Ben; and for the Determination of this Wager, they put themselves upon the Judgment of the Groom-Porter of England. And whereas the said John St. Leger, at the same Time and Place acknowledged the said Wager; by his Writing sealed; and by the said Writing obliged himself to pay to Pope, or his Order, 100 Nummos aureos, anglice vocat' Guineas, so soon as the Groom-Porter should give his Judgment, if that Judgment should be against the said St. Leger. And Pope says, that the Groom-Porter gave Judgment for him; and that the 100 Nummos aurei, anglice vocat' Guineas, then were, and still are, of the Value of 107 l. 10 s. &c.

St. Leger prays Oyer of the Writing, which is to this Effect, "That he had betted 100 Guineas against 150, concerning a Dispute, which is stated and signed by us both, and referred to the Groom-Porter of England; and promises to pay the Plaintiff 100 Guineas, as soon as the Groom-Porter gives his Judgment on the Case, if the Judgment be against him. The Question to the Groom-Porter is stated under the Letters A. and B. St. Leger is meant by A. and Pope by B." And then pleads 16 Car. 2. cap. 7. against excessive Gaming. Demurrer, and Joinder in Demurrer.

On the Argument of this Case, these Points were debated:

1. That this Case was within the Statute of 16 Car. 2. cap. 7.

But the Opinion of the Court was clearly, that it was not within the Statute, because it was a meer collateral Matter, and which happened by mere Chance, and the Event thereof did not depend on the Success of the Game. And also the Act expressly prohibits Wagers on the Parts or Hands of the Players. And if they had intended any other Wagers, it is probable that Mention would have been made of them.

2. Then an Objection was made to the Declaration, viz. that no Place was alledged, where the Groom-Porter gave his Judgment.

But to that it was answered by the Plaintiff's Counsel, that there was a Place alledged, for it is said, that the Groom-Porter adjudicavit, quodque præd' 100 Guineas fuer' valoris, &c. apud Paroch' S. Martini præd'. But if the Place had been omitted, yet the Declaration was good, notwithstanding this Exception, because the Defendant has confessed the Fact; and then this Fault is cured thereby, according to Sir Richard Grobham's Case, Hob. 82. Gurnon and Hardye's Case, Yelv. 11. 2 Cro. 682. Buckland's Case; and thereupon this Exception was disallowed by the Court.

3. It was objected, that it does not appear by the Declaration, that the Groom-Porter had given any Judgment on the Case, because it is not alledged, that the Case stated was tendered to the Groom-Porter, or that he has given his Judgment thereon.

To which it was answered by the Plaintiff's Counsel, that by the Declaration it appears that there was a Wager made between the Parties, and what it was; and then it is also alledged, that the Groom-Porter adjudicavit in casu præd'. And it also appears by his Judgment, that the Matter in Controversy upon this Wager was determined by him for the Plaintiff; which was sufficient. And afterwards the Plaintiff had Judgment by the Consent of the whole Court. Levinz and Birch were of Counsel with the Defendant; Pemberton and Lutwych with the Plaintiff.

But a Writ of Error was brought thereon; and on that it was insisted by the Plaintiff's Counsel in the Writ of Error,

1. That Debt in the Debet & Detinet (as this Case is) doth not lie for the 107 l. 10 s. for the Court cannot take Notice that Guineas are above the Value of 20 s. although by Way of Commerce and mutual Compact they pass for 1 l. 1 s. 6 d. but such Compact cannot enhance the Value of Coin; and therefore that the Demand ought to be only of

100l. 02 of 100 Guineas, with an Averment of the Value of them. He agreed the Cases of foreign Coins, and that Debt lies for 60l. *Monetæ Flandriæ*, which amounts to so much English, as 2 Cro. 88. *Yelv. 80.* Draper and Rastall's Case. 1 Leon. 41. But Latch 84. is, that for English Honey a Declaration cannot be ad valenc'. He also agreed, that in Fencot and Burrough's Case, Trin. 1 W. & M. B. R. where the Action was an Action on the Case, on a Bill of Exchange for 55 Guineas, the Court adjudged for the Plaintiff, because the Jury may assess Damages according to the Rate then current. It was otherwise in Debt; where the Plaintiff shall recover according to his Demand.

But to that it was answered by the Defendant's Counsel in the Writ of Error, that when one demands foreign Coin in Specie, the Writ may be in the Detinet only; but when the Value thereof in English Honey is demanded, it may be in the Debet & Detinet. And to this Holt C. J. and Eyre J. seemed to agree. And by Eyre J. Guineas are as foreign Coin.

2. It was moved, that this Case was within the Statute: But I do not find that the Counsel insisted much upon that.

3. It was objected, that it was not averred that the 100 Guineas were not paid in Specie. And for this *Rast. 158.* *Yelv. 135.* *Poph. 28.* 1 Cro. 515. were cited.

Holt C. J. said, that the Declaration was ill, for the Plaintiff ought to have declared on the Deed, and on the Case also, and then have shewn, that the Case was brought to the Groom-Porter, and that he had given his Judgment thereupon: But here the Plaintiff hath taken upon himself to aver the Purport of the Case, without producing it, which is not to be suffered. And although the Declaration, by Way of Recital, hath shewn the Substance of the Case, yet when it is in Writing, the Writing itself ought to be produced. As if A. and B. agree by Writing, concerning the Purchase of Lands in F. and afterwards A. covenants with B. to assign to him the Lands in the said Writing contained; if B. would bring an Action for Breach of this Covenant, he cannot shew that A. covenanted to assign the Lands in F. but the Lands in the Writing, and shew it, and that the Lands in the Writing and in the Declaration are the same Lands, without any Variance. And he inclined to reverse the Judgment for this Cause, and also because the Plaintiff has not shewn, that the Guineas were not paid in Specie. Sed adjournat'.



But in Trinity Term 7 W. 3. Holt C. J. and Justice Eyre being present, the Judgment was reversed.

And Holt C. J. gave the Reason, because the Plaintiff has shewn Case, and Play, and Wager, and then the Deed by which the Parties bind themselves in pignoratione præd'; and upon Oyer of the Deed, it appears that it was to stand to the Judgment of the Groom-Porter, upon a Case stated and signed by us both; which is not the same: And because the Writing containing the Case ought to have been shewn, and an Averment taken, that the Case therein, and in the Declaration, were all one. And although it was urged, that the Inducement of the Case, and that stated, are all one; and therefore whether the Averment was before the Deed, or after, it was not material; yet Holt C. J. was of another Opinion, because the Declaration supposes the Deed to be to perform a Wager contained in the Deed, whereas it is to perform a Case extrinsecal, and which is to be coupled by Averment.

And for this Reason the Judgment was reversed, as I have heard, by the credible Report of another.

George and Lawley. Mich. 5 W. & M.

**T**RESPASS, for entering his House, and taking a silver Cankard, &c. The Defendant pleads a special Justification, scil', quoad vi & armis nec non totam transgressionem prædict' præter intrationem domus prædict', & abscarrationem Canther' prædict', Non culp'; & quoad residuum transgressi' prædict', Actio non; quia dicit quod diu ante tempus quo, & eodem tempore, quo Gulielmus Divina providentia Cantuariæ nuper Episcopus fuit seiseit' de manerio de Lambeth, cum pertin' in dominico suo ut de feodo, in jure Ecclesiæ, ad quod ipse, & omnes illi quorum statum, &c. in manerio prædict' cum pertin' habuer', & tempore transgressi' fieri supposit' habuit visum franci plegii & omnia quæ ad visum franci plegii pertinent, tenend' infra præcinct' manerii prædict', quolibet anno intra festum beatæ Mariæ Virginis & festum Sti. Johannis Baptistæ, coram Senesch' Dom' Maner' prædict' pro tempore existent'; a tempore in cujus, &c. & dicit quod ad visum franc' pleg' prædict' Archiepiscopi manerii sui prædict', tent' apud Lambeth die Veneris octavo die Maii anno, &c. and so shews a Presentment of the Plaintiff by the Jury for a Nuisance, and an Amerciament, and a Warrant to the Defendant to distrain, &c. which was according

according to the Precedent in Raftal's Entries 606. upon which the Plaintiff demurred.

Per Holt C. J. He says that he hath a Leet, but doth not shew the Bounds and Limits of his Leet, or over what Persons the Leet has Jurisdiction, as to de residentibus & inhabitantibus infra Maner' de Lambeth, &c. for the Leet may extend into one Manor, or within four or five Manors, or there may be several Leets within one Manor; and therefore he ought to plead the Bounds of his Leet certainly. And also he does not shew the octavo die Maii to be inter festum Annunciationis beate Mariæ & festum Sti. Joh' Baptist'.

And for these Faults it was adjudged for the Plaintiff.

Revees and Pepper. Mich. 5 W. & M.

(20.)  
Skin. 362.

Per Holt C. J. **I**N many Cases, though a Man plead a Thing which may be given in Evidence, yet this shall not amount to a General Issue, as where the Plea goes by Way of Confession and Avoidance. Quod nota.

Cudmore *versus* Tripe. Mich. 7 W. 3.

(21.)  
5 Mod. 78.

**W**RIT of Error on a Judgment given in the Probost Court of Exeter, where the Plaintiff declared in an Indebitatus Assumpsit, and also in a Quantum meruit; but in the Quantum meruit doth not say, that the Cause was infra jurisdictionem Curie.

Carthew: If it had been omitted in the first Promise, I confess it had been ill; but I conceive the Infra jurisdictionem in the Indebitatus Assumpsit goes to all.

Holt C. J. Indeed there wants the ad tunc and ibidem. Let Judgment be reversed.

Lamb *versus* Mills. Mich. 7 W. 3.

(22.)  
Skin. 587.

**I**N Trespass quare clausum fregit & averia cepit & asportavit, the Defendant justified, and pleaded a By-Law, &c. and that he as Bailiff took the Beasts as a Distress, for Breach of the By-Law by the Plaintiff.

In the Resolution of the Court, Holt C. J. said, that the Pleadings were ill, because the Defendant had not shewn a Precept to make the Distress; for he could not do it *ex officio*, no more than a Sheriff might execute a Judgment of this Court without a Writ; and the Command in this Case is traversable.

Wilson *and* Field. Mich. 7 W. 3.

A<sup>C</sup> Guildhall. Debt for Rent upon a Demise for Years; (23.)  
the Defendant pleads, Nihil habuit in Tenementis; the Skin. 624.  
Plaintiff replies, he had a good and sufficient Estate to make the Demise to the Defendant modo & forma, &c. scil. that he was seised in his Demesne as of Fee; upon which Issue is joined. And upon Evidence, it was objected, that he ought to shew an Estate in Fee; non allocatur; for the Issue is joined upon the good and sufficient Estate to make the Demise, and any Estate is sufficient for this Purpose, out of which the Estate demised may be derived; and all added after the Scil. is but Form: But if he had not said, that he had a good and sufficient Estate, but only had said, that he was seised in his Demesne as of Fee, then he had been restrained to prove such Estate. Per Holt C. J.

Johnson *versus* Baynes. Mich. 7 W. 3.

D<sup>C</sup>emurrer on Replication; because the Abowry was only for Part of the Rent, without shewing how the Rest was satisfied. (24.)  
Cases W. 3. 84.

And per Holt C. J. If a Rent of a Quarter be 20 l. and you abowry only for 10 l. you must shew how the Rest is satisfied; just as in a Declaration for Part of a Debt due upon a Bond; and for this Holt and Sambach's Case is clear. 1 Cro. 103, 104.

Pierce *versus* Blake. Hill. 8 W. 3.

A Defendant pleaded a false Plea in Abatement, and the Court was moved, that the Attorney might be obliged to swear the Matter of it. (25.)  
2 Salk. 515, 516.

Holt C. J. We cannot compel him in any Case to swear his Plea, but where it is a foreign one; but if the Attorney puts



1 Saund. 97.  
Lutw. 236.  
Sid. 329.

puts in a false Plea to delay Justice, he breaks his Oath, and may be fined for putting a Deceit upon the Court. And here the Attorney shall plead immediately, so as he will stand by it; or if he do not, we will enquire into the Truth of the Plea, and if there appear any Deceit or a Trick, we will fine him.

If Judgment in Ejectment be signed in a Country Cause, for Want of a Plea, but no Possession delivered; a Judge in his Chamber, at any Time before the Assizes, may compel the Plaintiff to accept a Plea.

Powers *versus* Coot. Trin. 9 W. 3.

(26.)  
1 Salk. 298.  
Carth. 363.  
Bowers *versus* Cook.  
1 Salk. 298.  
5 Mod. 156,  
145.  
3 Bull. 250.

**D**EBT upon an Obligation against the Defendant, as Executrix of J. S. The Defendant pleaded, that J. S. died intestate, and that Administration was committed to her, & pet' judicium si ipsa ad billam prædict' respondere debeat, &c. The Plaintiff demurred, and insisted that the Defendant should have traversed, absque hoc, that she intermeddled before Administration committed to her; for if she did she made herself liable as a tort Executrix; and cited 3 Cro. 566, 810, 102. 3 Leon. 197. Yelv. 115. Brownl. 97.

Holt C. J. & Cur': Such a Traverse had been ill, for such Intermeddling is not alledged; and the Defendant ought not to traverse that which the Plaintiff doth not alledge in his Declaration.

Term. Trin.  
9 W. 3.  
Cafes W. 3.  
132.

Holt C. J. When you plead Outlawry in Abatement, when you put your Plea in the Office, you must shew a Capias, or some such Matter as may make the Outlawry appear; and not conclude only prout patet per Recordum, as you do when you plead it in Bar, and have Time to bring in the Record.

Giles *versus* Hart. Mich. 9 W. 3.

(27.)  
Cafes W. 3.  
152, &c.

**I**Ndeb' Assump' and Quantum meruit, for Goods sold, where in a Request was laid, both as to Time and Place. Defendant pleaded Non assumpsit to all, except 13 l. and as to that pleads, that after the Time of making the Promise, viz. 22 April, which was before the Time of the Request alledged, he tendered the said 13 l. which the Plaintiff then and there refused to receive; and that from that Day he

was

was always ready to pay the Money, and brings it into Court; whereupon the Plaintiff demurred.

Holt C. J. We are all of Opinion that the Defendant's Plea is ill; because the Defendant should plead, that he was always ready from the Time that the Money was due, which he cannot after Imparlance. It is not material for the Plaintiff to set forth a Time of Request 'till he comes to his Replication; and when the Defendant says he was always ready, that puts the Plaintiff in his Replication to shew a special Request; and that the Defendant did not then pay him; and so the Plaintiff must have his Damages.

Judgment pro Quer'.

Bonner *versus* Hill. Mich. 9 W. 3. Rot. 558.

THIS was an Action on several Promises, &c. The Defendant pleaded in Abatement a frivolous Plea, (viz.) that the Plaintiff had impleaded him in the Court of Common Pleas pro eadem causa actionis. The Plaintiff replied Nul tiel Record in the Court of Common Pleas, and concluded his Replication in Bar, (viz.) unde petit judicium & damna sua, &c. And upon a Demurrer to this Replication, it was insisted, that the Action was discontinued; and the Case of Biss and Harcourt was cited as an Authority in Point.

(28.)  
Carthew  
433.

Holt C. J. This Case differs from that, because here the Plea is ill, and the Judgment in this Case was upon the Insufficiency of the Plea. But in that Case the Plea was good, and the Judgment was upon the Replication; for that the Plaintiff had thereby prayed a wrong Judgment. If Matter of Fact is pleaded in Abatement triable per Pais, the Plaintiff may conclude his Replication in Bar, because final Judgment is to be given after a Verdict in that Case.

The Rule was, that the Defendant answer over.

Theobald *versus* Long. Trin. 10 W. 3.

THE Defendant pleaded in Abatement another Action depending in this Court. The Plaintiff's Counsel craved Oyer of the Record of the former Action, and moved for a Rule of Court, that unless the Defendant gave Oyer of it the next Day, that Judgment final might be given against him.

(29.)  
Carthew  
453, 454.  
1 Inst. 128.  
Keilw. 95,  
96.

Et per Holt C. J. Where a Record of the same Court is pleaded in Abatement, and the Plaintiff demands Oyer, and it is not given him in convenient Time, the Plea ought not to be received, but the Plaintiff may sign his Judgment. And the Rule was, that unless the Defendant gave Oyer the next Day, Judgment for the Plaintiff.

Pullen *versus* Benfon. Trin. 10 W. 3. Rot. 102.

(30.)  
Cases W. 3.  
204.

**D**E B C on a Sheriff's Bond for Appearance, 20 Nov. 9 Gul', conditioned, that William Benfon should appear in B. R. die Lunæ prox' post quinden' Martini Mich' 9 W. Defendant pleaded the Statute of 23 H. 6. and that the Bond was delivered by him the 30th of Nov. 9 W. and that William Benfon at the Time of the Delivery and making of the Bond, was taken and arrested by the Plaintiff, being Sheriff of Yorkshire, by a Writ returnable in B. R. in Mich. Term last past; that being so in his Custody, he took the said Bond from him; & hoc paratus est verificare. Whereupon the Plaintiff demurred, and shewed for Cause that the Plea was double, and wanted a Traverse; and the whole Court held the Plea to be ill, because when he pleaded the Bond to be primo deliberat' the 30th of Novemb', he should have traversed, absque hoc, that he delivered it the 20th of November, Yelv. 138. 2 Cro. 264. for here the Date was material. For suppose the Arrest was before the Return of the Writ, and after the Return of the Writ he took an antedated Bond, this Bond is void; and therefore the Date ought to be traversed.

And per Holt C. J. The Date of the Bond is one Thing, and the bearing Date another; the Date of the Bond is the Delivery of it: Wherefore the Plaintiff had Judgment.

Moor *versus* The Manucaptors of Garrett. Mich. 10 W. 3.

(31.)  
Cases W. 3.  
214.  
Salk. 566.

**S**Ci' fac' versus Bail, who pleaded, that there was no Capias against the Principal; the Plaintiff replied, and set out a Capias, prout patet per Recordum; the Defendant rejoined Nul tiel Record; Plaintiff surrejoined, that there was such a Record, and prayed a Day to bring it in; whereupon the Defendant demurred.



Per Holt C. J. This Way of Pleading is out of the common Course. There are two Ways of pleading of a Record, either by craving Oyer of the Record, and if it is not given it is a Failure; or he may plead Nul tiel Record, and then a Day is given to bring it in; but this Sur-rejoinder is a third Way, and a new one. But it was adjudged well enough; and Plaintiff had Judgment.

Anonymus. Trin. 11 W. 3.

**O**N a Question, whether there ought to be new Rules to plead upon an Amendment? It was said, that if the Plea was of another Term, there ought to be new Rules; otherwise if it be a Plea of the same Term, for then there is a Rule to warrant the Judgment. (32.)  
2 Salk. 517.

Holt C. J. Anciently they did not plead de novo after an Amendment; therefore giving Rules to plead again cannot be the ancient Course: And the Practice of new Rules for Pleading is but of late introduced, though with great Reason. When the Plaintiff amends, and gives an Imparlance, there shall be new Rules to plead; and otherwise not.

West *versus* West. Pasch. 12 W. 3.

**I**N Action of the Case for a false Return, &c. Holt C. J. & Cur' agreed, that if one pleads the General Issue, and it is not entered, within four Days of the Term he may waive it, and plead specially; and if the last of the four Days happen to be Sunday, then Monday shall be allowed: And so in Case of a Plea in Abatement. And the Defendant at any Time after may waive the Special Matter, and plead the General Issue; except there is a Rule to plead as he will stand by it. (33.)  
3 Salk. 274.

Where the Plaintiff releases after the Action brought, the Defendant ought not to plead Actio non, &c. but Actio-nem præd' ulterius habere non debet: It is the same of any Matter which happens either to abate the Writ, or to bar the Action, after the Writ issued. 2 Lutw. 1178.

By Holt C. J. There is no Difference between a voluntary Appearance, in order to plead, and an Appearance upon a Capi Corpus; for the voluntary Appearance is not good, unless  
Term. Trin.  
12 W. 3  
2 Salk. 518.

Ibid. 515.  
See Ord.  
Trin. 5 G. 2.

unless a Writ hath been taken out : Therefore if a Writ be issued, and the Defendant agrees to appear, he shall appear and plead according to the Return of the Writ ; and if the Return be before Menssem Paschæ, he is obliged to plead to enter ; but if the Writ taken out were returnable after Mens. Paschæ, he shall have an Impar lance till next Term. If a Declaration in Easter Term is delivered before Mens. Paschæ, the Defendant on a Habeas Corpus must plead to try ; upon a Cepi Corpus, to enter only.

### Wood *versus* Cleveland. Pasch. 12 W. 3.

(34.)  
2 Salk. 518.

Vide 6 Mod.  
191, 241.  
1 Salk. 399,  
401.  
1 Mod. 1.  
Farreß. 3.  
1 Rol. Abr.  
774. pl. 1.  
Cro. Car.  
443.  
Hob. 194.

**I**N Trespass, the Plaintiff signed his Judgment for Want of a Plea ; the Defendant after Term, and before the Assizes, offered him a Special Plea, or to plead the General Issue, provided the Plaintiff would consent to enter into a Rule, that he should be allowed to give Special Matter in Evidence. The Plaintiff refused, and executed a Writ of Enquiry. It was moved, that upon paying Costs, the Judgment might be set aside, and the Plaintiff obliged to accept their Plea, and go to Trial, the Plea being fair, and containing Special Matter of Title.

The Motion was granted.

Term, Trin.  
12 W. 3.  
Cases W. 3.  
407.

Holt C. J. If there be an ill Plea, and the Replication assign an ill Breach, the Plaintiff shall have no Judgment. Vide 8 Co. D. Bonham's Case.

### Pierce *versus* Paxton. Trin. 13 W. 3.

(35.)  
2 Salk. 519.  
2 Salk. 508.  
2 Lev. 212.

**D**EBT on a Bond; the Defendant puis Darrein Continuance pleaded Payment of Part, and an Acquittance in Abatement.

Upon Demurrer Holt C. J. held it a Plea in Bar, and not in Abatement. Vide 3 Cro. 342. Al. 63, 65. 3 Cro. 157.

### Anonymus. Trin. 13 W. 3.

(36.)  
2 Salk. 519.

**T**HIS was a Case relating to pleading a Deed, and giving it in Evidence, at Common Law and by Statute, wherein a Difference was made.

Holt C. J. If a Statute makes Writing necessary to a Common Law Matter, where it was not required by the Common Law, the Party need not plead the Thing to be in Writing, but give it in Evidence: Though if a Thing is originally made by Act of Parliament, which requires it to be in Writing, you must plead it with all the Circumstances required by the Act. And therefore upon the Statute H. 8. of Wills, a Will must be pleaded to be in Writing; but a collateral Promise, required to be put in Writing, by the Statute Car. 2. is well enough, if you prove it to be so in Evidence, without pleading it to be in Writing.

Lutw. 1425.  
1 Sid. 142.  
1 Lev. 51.

32 H. 8.

29 Car. 2. c. 3.

A Man pleads over, he shall never after take Advantage of any Slip or Mistake in the Pleading of the other Side, which he could not do upon a general Demurrer.

Weeks *versus* Peach. Mich. 13 W. 3.

**I**N Replevin for taking Chattels, in a certain Place called A. and also in another certain Place called B. The Defendant avowed the Taking in prædict' loco in quo, &c. To this the Plaintiff demurred. Per Cur': The Locus in quo relates only to one Place; so that there is a Discontinuance, the Avowry not being an Answer to the whole Declaration.

(37.)  
1 Salk. 179.  
3 Lev. 40.

Holt C. J. said, If a Plea begin with an Answer to the Whole, but in Truth the Matter pleaded is only an Answer to Part, the whole Plea is naught, and the Plaintiff may demur. But where a Plea begins only as an Answer to Part, and is in Truth no more, it is a Discontinuance, and the Plaintiff must not demur; but take his Judgment for that as by Nil dicit.

1 Saund. 268.  
2 Saund. 73.  
Farrell. 124.

Hatton *versus* Morle. 1 Ann.

**H**ERE the Defendant in an Assumpsit, &c. pleaded, that he did promise, but before the bringing of the Bill, he paid the Money to the Plaintiff: On Demurrer to this Plea, it was objected that it amounted to the General Issue.

(38.)  
3 Salk. 273.

Holt C. J. This doth not amount to the General Issue; the Defendant may plead Payment, because it admits the Assumpsit, and yet give it in Evidence on Non Assumpsit;



for it is like giving Colour, he says, true it is, there was a Promise, but that he performed it. Now there are many Things which may be given in Evidence upon a General Issue, and yet they may be pleaded specially: As for Example; In Action of Debt the Defendant may plead a Release, or give it in Evidence on Nil debet pleaded; so in Debt for Rent upon a Demise, the Defendant may plead an Entry, before any Rent became due, or he may give this Matter in Evidence. And there are two Sorts of Colour in Pleading; the one is express, where in Trespas for breaking the Plaintiff's Close, the Defendant makes a Title from R. S. setting forth that the Plaintiff claims under a Feoffment from him, by which nothing passed, but that he entered by colour thereof: This is a giving Colour of Action to the Plaintiff, because by the Feoffment he was Tenant at Will, and entered; and by Virtue of his Possession may maintain an Action against every one, but him who hath a Right. But in such Action of Trespas, if the Defendant pleads, that the Plaintiff was seised, &c. and made a Lease to him for Years, there is no Occasion to give express Colour; for the Defendant allows, that the Plaintiff hath the Reversion, which implies it.

1 Inst. 282,  
283.  
2 Roll. Abr.  
681.

1 Rep. 79,  
108.

The Reason of giving Colour in Trespas is, that the Defendant's Plea may not amount to a General Issue; for where a Defendant justifies by Title in Action of Trespas or Assize, if he do not give the Plaintiff Colour, his Plea amounteth only to Not Guilty; and this is ill in Pleading.

### Pegrove *versus* Saunders. Mich. 2 Ann.

(39.)  
6 Mod. 81.  
S. C. 1 Salk.  
5.

**I**N Replevin for several Things; as to some the Defendant pleads Property in himself; and to others Property in a Stranger, in Bar: And it was objected, that Property in a Stranger could not be pleaded in Bar. 1 Vent. 249.  
2 Lev. 92.

6 Mod. 103,  
69.  
31 H. 6. 12.  
1 Salk. 5, 94.

But Holt C. J. said, he remembered to have heard Hale make the Difference, that if Property be pleaded in the Defendant, it may be either pleaded in Bar or Abatement; if in a Stranger, only in Abatement; but that upon great Deliberation it had been held since, that there was no Difference at all, for both may be pleaded in Bar; according to 2 Cro. 519. Salkild *versus* Sheton. And Judgment was Quer' nil Capiat per Billam; and Return awarded. Per Cur'.

Walden *versus* Holman. Hill. 2 Ann.

**H**Olman was sued by the Name of B. H. and pleaded in Abatement, That he was baptised, and always known by the Name of J. Absque hoc, that he the said J. was ever called or known by the Name of B. H. Plaintiff replies, That he was known by the Name of B. from the Time of his Baptism. To which the Defendant demurs. Judgment to answer over.

(40.)  
6 Mod. 115,  
116.

D'avenant *versus* Rafter. Mich. 3 Ann.

**I**N this Case Holt C. J. took this Diversity as to Conclusions of Pleas; that if a dilatory Plea be pleaded, and the Plaintiff take Issue upon it, he may conclude with a Petit judicium & damna, because there final Judgment shall be given: But if a Dilatory be pleaded, which the Plaintiff doth not deny, but confesses and avoids it, he must not conclude Petit jud. & damn'. As if the Defendant pleads an Attainder in Disability of the Plaintiff, and he replies a Pardon; here his Conclusion must be in Maintenance of his Writ.

(41.)  
Mod. Cases  
236.

Henly *versus* Walsh. Hill. 4 Ann.

**T**his Case was again argued by Squibb for the Defendant, and Eyre for the Plaintiff; and Eyre held the Plea not good, because the Certainty of the Sum tendered is not set forth, nor is there any Refusal; for the Refusal is of the Gelding; but 'tis not said that he refused the Money, and all the Precedents of Tenders are of a Sum certain; and the Book cited of 44 E. 3. 14. is not against me, for that is no more than the Issue may be taken on the Sufficiency of the Amends.

(42.)  
Where a Man ought to plead the Sum tendered in Certainty, and where it is sufficient to plead, that he tendered sufficient Amends.

Squibb: The Tender of sufficient Amends was well enough, and that proper Issue was the Sufficiency of the Amends; and if not, 'twas but a Default in Form, which is aided by a general Demurrer; as if I plead my self to be Cousin and Heir, and do not shew how; this is bad on Special Demurrer; but if you demur generally, 'tis aided, and the Court did hold, that Tending sufficient Amends is enough,

enough, ascertaining the same, and the proper Issue is, Sufficient, or Not sufficient :

And Holt C. J. said, 'twas never necessary to plead in certain the Sum tendered, unless the Lord demands too much; for when the Lord demands so much, then the Owner shall tender so much, and which of them is sufficient to the Jury is a Question; but the Owner must in such Case set forth a Sum certain; for tho' the Lord demands too much, yet he may keep the Estray until the Owner does tender sufficient Amends. 1 Roll. 879. 5. by Tanfield C. J. But in this Case the Plaintiff's Replication does destroy his Action; because first he brings Trespass for his Taking an Estray; and then in his Replication he does not set forth, that he did proclaim him; and it does also there appear, that it was more than a Year and Day after the Taking him as an Estray; that the Defendant, as Owner, took him away; now after the Year and the Day, the Lord had the absolute Property in him, which is much a greater Property than a Lord has in an Estray; and if you do first declare for him as an Estray, and in your Replication shew the Property was absolute in you, that is bad; then if you do not shew that this Estray was proclaimed the next Market-day after the same was found, at the next Market-Town, you have no Property in the Estray; and so your Action fails therein also; for you must, to justify your self, shew that you did what the Law required of you, to give you this Title; to which Powell agreed.

Holt C. J. If the Owner of an Estray comes to the Lord and Demands his Beast, the Lord is not obliged to give it him immediately, until he is satisfied by the Owner's Description of the Marks, that he is the Owner's, and when he is satisfied therein, then it's proper for the Lord to make his Demand; and if it be the Owner's, he is to tender a Sum certain; and so it must be pleaded; but 'tis not necessary in this Case.

The Owner of an Estray cannot reasonably know what Amends are sufficient; for which Reason the Lord is to make his Demand; but where Cattle are taken Damage-feasant, the Owner is at his Peril to know what Damage the Cattle have done, and is to make a Tender of sufficient Amends; and he, that does take the Cattle in such Case, need not make any Demand. So in this Case, for all these Reasons, the Court gave Judgment for the Defendant.



Turner *versus* Beale. Pasch. 5 Ann.

**I**N Assumpsit the Defendant cognovit actionem; but in Bar of Execution as to his Person, Apparel, &c. pleaded 2 & 3 Ann. c. 16. and that he was a Prisoner in the Marshalsea, and tiel jour & ann. debito modo discharged by the Justices at such a Sessions juxta formam Statuti. To this it was demurred, and insisted, that it did not appear that he petitioned; and the Defendant ought to shew his Qualifications, and it ought not to be put upon the Plaintiff, to shew that he was not qualify'd. *Mr. Eyre contra urg'd*, That all was aided by juxta formam Statuti. Vide 1 Cro. 314. 2 Cro. 609.

(43.)  
2 Salk. 521.

2 Salk. 506.  
1 Salk. 345.  
Mod. Cases  
22.  
Mod. Cases  
301.

Holt C. J. The Sessions cannot intermeddle but upon Application. You must shew that your Discharge was regular, and not deficient; the Plaintiff is a Stranger, and 'tis not to come on his Side.  
Judgment for the Plaintiff.

Norris *versus* Ware. Trin. 5 Ann.

**E**rror of a Judgment in Trespass in C. B. by Default; the Plaintiff gave a Letter of License under his Seal to the now Defendant, and after that he got the said Letter of License, and broke off the Seal, for which the Defendant brought his Action of Trespass in C. B. and declares, that the Defendant quoddam factum of the then Plaintiff, sigillo of the then Defendant sigillat. took and broke off the Seal, and had Judgment there by Default; and a Writ of Error, that the Plaintiff did not set forth the Date of the said Deed or Letter of License, nor where it was made; but,

(44.)  
A nice Difference taken between declaring of a Deed, and on a Deed.

Holt C. J. said, That was not material; for if it was a License from the first of January to the first of June, and that he was arrested in that Time, the Action lies; and that may be brought after that Time on the Letter of License; and as to the Place where, 'tis not material, for if there was such a Deed at all, 'tis sufficient; but the Doubt was, how it could be the Factum or the Deed of the then Plaintiff, being sealed and delivered by the then Defendant; 'tis true 'tis his Writing, and he had a Property therein

by the Delivery, and might bring Trespafs. We will consider; & adjournatur.

At another Day the Court affirmed the Judgment.

Holt C. J. thought, that if the Defendant had demurred specially upon the Declaration, it might be for him, because at least 'tis not formal; but it cannot be Error; for in Truth 'tis the Deed of the Plaintiff in Point of Interest, tho' in Point of Lien 'tis the Deed of the Defendant; if Charta had been instead of Factum, it had been better; and the Court held 'twas not necessary to set forth the Date of the Deed, when you declare of a Deed. Otherwise they held, when you declare upon a Deed; and so a Difference; for here he only describes the Deed.

Turner *versus* Beale. Mich. 5 Ann.

(45.)

'Tis no good Plea on a Statute for discharging Insolvent Debtors, to plead he was Debito modo acquietatus.

**D**Ebt; the Defendant pleads, that he was, by the late Act for the Relief of poor Debtors, debito modo acquietatus juxta formam ejusdem Statuti; to which Plea there was a Demurrer.

Eyre for the Defendant argued, the Plea was good, as in Johnson's Case. 2 Cro. 609. An Innholder was indicted 4 H. 4. for selling 200 Bushels of Oats for 12 l. at 8 d. per Bushel contra formam Statuti, &c. and does not say what the common Price was by the Statute; and this Exception was over-ruled.

Holt C. J. But 'tis said after, in that Case, what the common Price was, pro quolibet modio.

Eyre: This is after a general Demurrer, and is but a Fault in Form. 1 Lev. 190, 194. And there is a Case in Point, 1 Ventr. 356, 357. and 'tis like the Condition of a Bond for Payment of Money at a Day and Place; and the Defendant pleads Payment secundum formam & effectum; this is well enough on a general Demurrer, tho' bad on a special Demurrer. 3 Lev. 245.

Holt C. J. agreed, That the last Case was good Law; but the Case 1 Ventr. 356. I never did like, which I remember very well; for you are privy to your Discharge, and should therefore plead it; nor is it like the Cases 1 Lev. 190, 194. Where Faults of Form are cured by general Demurrer.

Judgment for the Plaintiff.

Willet *versus* Waxcomb. Mich. 5 Ann.

Covenant; and assigned for Breach, that the Lessee did not pay his Rent; and the Defendant pleaded Riens arrear; and Issue was joined, and found for the Plaintiff; and 'twas moved in Arrest of Judgment, that the Plaintiff has not in his Count intitled himself to the Rent; for he does not say that his Ancestor died seised of the Reversion, nor that the Plaintiff was seised of the Reversion or Rent; but Salkeld said, that this was helped by the Verdict; for the Defendant admits by this Plea, that the Reversion and the Rent was in the Plaintiff.

(46.)  
Whatever  
may be pro-  
ved or given  
in Evidence  
on a Trial is  
amended by  
Verdict.

Holt C. J. Whatever is to be given in Evidence on that Issue by the Plaintiff, is in such Case helped by the Verdict, but on Riens arrear nothing is to be given in Evidence, but Payment, or Not Payment; but here the Proof lies on the Defendant, Whether he paid, or not; if in this Case the Reversion had been in another, it must have been pleaded; so the Verdict does not make the Declaration better in any Case, but where the Plaintiff is to give the Matter in Evidence, and Want of such Matter in the Declaration is aided; as for his Admittance, there's no more admitted than your Declaration, and that is bad; and if this had been an Action of Debt for the Rent, it had been the same.

Powell: If Riens arrear was pleaded, the Defendant might give in Evidence, the Rent-day was not incurred. Adjournatur.

Woodrington *versus* Deverill. Hill. 5 Ann.

Afterwards Hill. 5 Ann. inter Woodrington and Deverill. In Debt on a Bond, the same Case happened as before; see Turner *versus* Beale; and then the last Case was remembred; and without pretending to make good the Plea in Form, the Stat. 4 & 5 Ann. c. 16. was insisted on, viz. That Judgment shall be given as the Right appears, &c.

(47.)  
2 Salk. 521,  
522.

Powell J. said, That It did not help Substance; that if this Sort of Pleading be good, the Court can never know when particular Jurisdictions act with Authority, or not.

Quod



Quod Holt C. J. concessit, saying, This Exposition was to take the Party's Issue from him.

Willet *versus* — Mich. 7 Ann.

(48.) **I**N an Action of Covenant brought by the Son, upon the Demise of the Father, for Rent; he declares quod cum demisit, without alledging that his Father was seised of any Estate. The Defendant pleaded Riens in arrear; and after a Verdict for the Plaintiff, it was moved in Arrest of Judgment.

Holt C. J. If a Man intitlesh himself to have an Action as Heir to his Father, he must shew that his Father had some Estate.

The Defendant's Plea is not good, to say nothing in arrear; but he ought to answer the special Matter alledged, as to plead Payment, this being in Covenant. But it is good in an Avowry. But in an Avowry for a Rent-Charge it is doubtful.

Powell J. This is the common Form of a Declaration, to say, Quod cum demisit. But when you are to intitle yourself to the Reversion, you must shew the Father was seised.

If you had set forth an Estate-tail, it had been well; the Defendant has pleaded Riens in arrear, which is a strange Plea; but the Jury have found that he was in arrear.

Holt C. J. Where the Demise is his own, he need not set forth any Title. But where it is another's, and he brings his Action, and he intitlesh himself under the other, he must set forth his Title.

Roberts *and* Morgan. Trin. 8 Ann.

(49.) **T**RESPASS for Breaking and Entering the Plaintiff's Close and treading the Grass, and other Trespasses for Entering and Consuming the Grass with Oxen, Sheep and Cows. The Defendant justifies, that the Duke of Bedford is seised in Fee of the Manor of, &c. and so layeth a Prescription for a Way over the Close: To this the Plaintiff demurred. Mr. Raymond: Our Exception is, that the Plea pleaded in Bar is to the Whole, and there is no Justification for the Oxen, Sheep, and Cows. The Prescription goes to the Whole, but that the Defendant does not

answer the Party as to the Oren, &c. 2 Vent. 193. Johnson versus Adams. 5 Mod. 77. Eyre vers. Glofan, Cart. 51.

Per Holt C. J. & Cur': Judgment for the Plaintiff, because the Defendant did not Answer to the whole Trespass.

## Pledge and Bailment.

Anonymus. Pasch. 5 W. & M.

**I**F a Pawn-broker refuses, upon Tender of the Money, to redeliver the Goods pledged, he may be indicted. 2 Salk. 522; 523.  
Per Holt C. J. and Eyre J.

The Pawnee hath a Property; yet if the Pawn be somewhat that will be the Worse for Wearing, as Clothes, &c. the Pawnee cannot use it. But if it be somewhat that will not be the worse for Wearing, &c. as Jewels, &c. the Pawnee may use them, at Peril; for if he is robbed in Wearing them, he is answerable, because the Using occasioned the Loss. Vide Owen 423. But if the Pawn is laid up, and the Pawnee is robbed, he is not answerable. Lit. Rep. 332. Kelw. 82. 4 Co. 32, 38. Co. Lit. 89. Yelv. 178. Owen 124. 2 Cro. 224.

If the Pawn be a Cow or a Horse, the Pawnee may milk the Cow, or ride the Horse, in Recompence of the Keeping. 4 Co. 38. Yelv. 178. Co. Lit. 89.

If a Creditor takes a Pawn, he is to restore it upon Payment of the Debt; but if his Care in keeping it be exact, and the Pawn is lost, he shall be excused. And if it be lost, the Pawnee hath still his Remedy for the Money against the Pawner.

If a Pawn therefore be lost before Tender, the Pawnee is not liable, unless there be Default in him; but if after Tender he keeps the Goods, and they are stolen, the Pawnee must Answer. Per Holt C. J. in the Case of Coggs and Bernard, Trin. 2 Ann. B. R. Lit. Rep. 332. Owen 124.

## P O O R.

The King *versus* Fairfax & al'. Mich. 1 W. & M.

( 1. )  
3 Mod. 269,  
270, 271.

**A**N Order of Justices made at the Quarter-Sessions of G. was removed into this Court, confirming another Order of the Justices there, for placing a poor Boy out an Apprentice in Husbandry: And it was moved that it might be quashed; for the Justices had no Power given them by the Statutes to compel a Man to take such Apprentice. By 43 Eliz. the Church-wardens are impower'd to raise Money to bind poor Children to Trades; and if they could oblige Persons to take them, what Occasion was there for raising Money to place them out? And here the Order doth not mention, that the Party, to whom this poor Boy was bound, did occupy any Land in Tillage, for so it ought to be; otherwise the Overseers may bind him to a Merchant, or an Attorney, &c. whereby Diseases might be brought into Families, and a Man would have no Security for his Goods or Money.

43 El. c. 2.  
Dalt. 114.

To this it was answer'd, that by the Statute 43 Eliz. the Justices may place out poor Children where they see it convenient; and since the Justices of Peace have such Power, 'tis no Objection to say, there may be an Inconvenience in the Exercise of it, by placing forth Children to improper Persons; for if that be done, the Party hath a proper Remedy by Way of Appeal to the Quarter-Sessions: And three Judges were of Opinion, that the Justices had such a Power; and therefore they held the Order should be affirmed.

Holt C. J. I am of a different Opinion; here the Statute means something, when it says, That a Stock shall be raised by Taxing every Inhabitant, &c. for putting out poor Children Apprentices: And there are no compulsory Words in the Statute for that Purpose, nor any which oblige a Master to take an Apprentice; and without which the Justices have not Power to compel any Man to take a poor Boy, for possibly such may be a Chief, or Spy in the Family. But because here is an apparent Fault in the Order, for that the Statute has entrusted the Church-wardens

Sid. 29.



dens and Overseers of the Poor, with the Assent of two Justices, to bind Apprentices, &c. and the Church-wardens are not mentioned in this Case:

Therefore this Order was quashed.

Walton *versus* Spark. Pasch. 7 W. 3.

**D**EBT upon a Bond, conditioned to save a Parish harmless from John Goslin, his Wife and Children. The Defendant pleaded, that the Parish was not damaged, &c. The Plaintiff replies, that Joseph Goslin (Son of the said John) became Poor, and that two Justices made an Order, that the Parish should pay 2 s. per Week for the Maintenance of Joseph, his Wife and Children, and by Virtue thereof the Overseer, 14 Septemb. &c. paid 2 s. for one Week then past, and that 8 d. Part thereof, was for the Maintenance of Joseph. The Defendant rejoins, that Joseph was able to maintain himself, absq; hoc, that 8 d. was paid for the Maintenance of Joseph. The Plaintiff demurs; and it was resolved by the Court,

(2.)  
Com. 320,  
321.

1. That this Traverse was immaterial; for a Traverse should be always of such Part, as, if found for the Defendant, would destroy the Plaintiff's Action. Vaugh. 8. Here the Wife and Children of Joseph are Part of his Family, and Relief for them is for him.

Holt C. J. said, That if a Man marries a Grandmother with whom he hath any Estate, and she dies, he must maintain the Grandchildren, tho' the Relation be determined.

Whereas it was objected, That the Justices would not make such Order for Payment of a certain Sum weekly, the Court seem'd to be of the same Opinion; but said, they do it all over England; & Communis Error facit jus. But howsoever, that is not now the Question; for if the Parish paid it, it is a good Breach; and then the Breach being well assigned, the Averment of the 8 d. (which led the Defendant out of the Way) is Surplusage and Nugatation.

Judicium pro Quer'.

The

*The Inhabitants of Trowbridge versus Weston.*  
Mich. 8 W. 3.

( 3. )  
2 Salk. 473,  
474.

Comb. 413.  
5 Mod. 537.  
149.

**O**R Motion to quash an Order of two Justices, for removing a poor Person, it not averring, but reciting only that they were credibly informed it was the Place of his last legal Settlement; for this Omission it was quashed: The Statute says, the poor Person shall be removed to the Parish where he was last legally settled; and it has been held, that legal Settlement, and last legal Settlement are the same Thing, because by every new Settlement the precedent is discharged. By Holt C. J.

And if one of the Justices be not of the Quorum, it is Cause for quashing such Order; for this being a special Authority by Statute, it must appear to be pursued.

*Between the Parish of Ryslip and Hendon.*  
Hill. 8. and Mich. 10 W. 3.

( 4. )  
5 Mod. 416,  
417, 419.

**C**ounsel moved to quash an Order of the Sessions, which was made for the Removal of a poor Man from Ryslip to Hendon; who had been before removed from another Parish, and was afterwards on an Appeal sent back again: 'Twas insisted, that the Order, by which he was removed to Hendon, was not good; for the Statute 13 & 14 Car. 2. gives an Authority to send poor Persons to the Place of their last legal Settlement; and therefore the Justices at their Sessions having once settled this Person at Ryslip, and so executed their Authority, he is not to be removed after it.

Holt C. J. Where the Justices of Peace do give a special Reason for their Settlement, and the Conclusion which they make in Point of Law will not warrant the Premises, there we will reverse their Judgment: But if they have given no Reason at all, then we will not ravel into the Fact. And here it appears, that the Person had a Freehold at Hendon, which descended to him; now if this Man may go and live there forty Days, as certainly he may, he shall not be disturbed; and tho' the Justices do adjudge this not to be a Settlement, yet we determine it otherwise according to Law: Indeed it is said, that the Justices of Peace have adjudged the Matter upon an Appeal between

Ryship and Hendon, and this is conclusive; for we cannot falsify their Judgment, tho' it be illegal we cannot correct them in Fact, of which they are Judges.

2 Mod. 72.  
Mod. Cases  
287.  
2 Salk. 524.

And the Chief Justice held, that having Land in a Parish will not make a Settlement; but living in the Parish where one has Land, will gain a Settlement, without Notice; for the Act of Parliament never meant to banish Men from the Enjoyment of their own Lands, and the Law takes Notice of Freeholders, as those that chuse Members of Parliament, &c.

See 9 Geo. 1.  
c. 7.

*The Inhabitants of Dimchurch and Eastchurch.*  
Hill. 9 W. 3.

**A**N Order made at the Quarter-Sessions set forth, (5.)  
That whereas the Parish of D. was over-burdened 2 Salk. 480,  
with Poor, and the Parish of E. had no Poor; therefore 481.  
it was ordered, that the Parish of D. should be annexed to E. and the Occupiers of Land there should contribute 20 l. per Annum to D. as long as that was over-burden'd with its Poor, and E. had none.

Holt C. J. There are two Ways by the Statute 43 Eliz. to make one Parish contributory to the Poor of another, viz. either the Justices may tax particular Persons in Aid to that Parish, which cannot relieve its own Poor; or they may assess the whole Parish in a certain Sum, and leave it to the Church-wardens and Overseers to levy the same, on particular Persons, as was done in this Case: But so much of the Order as concerns the Annexing of the Parishes, is void; and the Rest good.

Comber. 242.  
309.

*Shoreditch Parish's Case.* Mich. 10 W. 3.

**T**HE Church-wardens and Overseers of the Poor (6.)  
of the Parish of Shoreditch, made a Poor-rate, Carthew 464.  
which was signed and allowed by two Justices of Peace.

Upon an Appeal to the Sessions, this Rate was vacated as partially made, charging the Lands only, and omitting the personal Estates.

Afterwards they made a new Rate, charging all Real and Personal Estates, from which several Inhabitants likewise appeal'd to the Sessions, complaining that the



Lands were charged with nine Parts in Ten more in Proportion than the Personal Estates.

This being true in Fact, the Sessions vacated this second Rate, and ordered the Church-wardens to make a new and more equal Rate.

It was moved, that this last Order be quashed, for that upon an Appeal of some of the Inhabitants only, the Sessions had no Authority to vacate the whole Rate, but only to relieve the Parties Appealing.

Holt C. J. 'Tis impossible to give Relief to every particular Person, because the whole Rate was illegal, and the Words of the Statute 43 Eliz. concerning Appeals, are very large.

The Justices in Sessions, upon an Appeal, may vacate the whole Rate, if they find it illegal, and in such Case may make a new Rate themselves, or direct the Church-wardens to do it.

The Order was confirmed.

Wangford *versus* Brandon, *Parishes*. Pasch.  
10 W. 3.

(7.)  
Carthew 449.

**T**HE Body of this Order was to remove three Men (naming them) with their Families, from the Parish of Brandon to the Parish of Wangford; and the Fact was thus:

1. Three poor Men of Wangford came into the Parish of Brandon, and there married with three poor Widows of that Parish, who received Relief, &c. and each of the said Widows had Children by their former Husbands, some of the Children being under the Age of seven Years, and others above that Age; and this Order was not only to remove the three Men and their Wives, but also their Children, to the Parish of Wangford, as their last Place of Settlement.

Et per Holt C. J. The Children are not removable into Wangford, to charge that Parish by Settling them there; but Nurse-Children under the Age of seven Years, may be sent thither with their Mothers for Nurture, but Brandon must relieve them there, and not Wangford; the other Children above the Age of seven Years ought not to be removed at all, being settled Inhabitants in Brandon, the Removal of their Mothers hath no Influence on the Settlement of their Children.

The Justices have made an ill Use of this General Word Family; per Curiam, the Order was quashed.

*Bridewel Precinct's Case.* Hill. 11 W. 3.

A Apprentice for seven Years to a Master of Bridewel Hospital, being out of his Time, set up his Trade in Clerkenwel, where he married, and had Children; and now, being chargeable to that Parish, was by the Order of two Justices sent to the Precinct of Bridewel, as the Place of his last legal Settlement; the Order recited, that Bridewel was extraparochial, and for that Reason this Order was quashed, because the Statutes concerning Settlements of the Poor do not extend to extraparochial Places; but that is *Causa omittus*. (8.) Carthew 515.

Sed per Holt C. J. Extraparochial Places may be taxed by Way of Contribution in Aid of a Parish over-charged with the Poor.

*Inhabitants of the Forest of Dean and Parish of Linton.* Trin. 12 W. 3.

A Poor Man lived some Years in the Forest of Dean, and then died, and left several Children unprovided for; whereupon two Justices made an Order to remove them to Linton, in the County of Hereford. (9.) 2 Salk. 486, 487.

Holt C. J. If a Place be a Parish in Reputation, and have Church-wardens and Overseers of the Poor, it is within 43 Eliz. tho' in Truth it be no Parish; but if it be merely extraparochial, as the Justices cannot send any one to such Place, so they can't send from it: For it being exempt from receiving, it shall not have the Benefit of Removing; and they have not proper Officers to complain. Persons in extraparochial Places must subsist on private Charity, as all Poor did at Common Law, before the Statute of 43 Eliz. which enacts, That every Parish shall keep their own Poor; in Consequence of which the Jurisdiction and Power of Removals, was first set up before the Act 14 Car. 2. For unless the Poor were removed to their own Parishes, every Parish could not maintain its own Poor: But that Statute does not extend to extraparochial Places.

Carthew 415.

2 Lev. 142.

4 Mod. 157.

By Holt C. J. Extraparochial Places possibly may be taxed by Way of Contribution, in Aid of a Parish overcharged with the Poor; but a Parish shall not in Aid of that: This is *Calus omittus*. It has been since held, that in any extraparochial Place, coming under the Denomination of a Till, the Justices may exercise the Powers given by the Statutes.

The King *versus* The Inhabitants of Audly.  
Mich. 12 W. 3.

(10.)  
2 Salk. 526.

SEPT. 1. 1665. A Rate was agreed to by the Inhabitants of the Parish of Audly, which had been followed ever since till the last Year, when a new Rate was made: Upon Appeal to the Sessions the new Rate was quashed, and the old one ordered to stand. This being removed into B. R. by Certiorari, it was objected, that it did not appear this was a Poor's Rate, being called a Parish-Levy, which might be as well for the Church as the Poor; and then the Justices had no Jurisdiction. Darnel: The Court will intend it.

Holt C. J. If a particular Jurisdiction does not shew the Matter to be within its Authority, it must be taken to be out of it. Mr. Parker took an Exception, that the old Rate, however just at first, might be unequal now, and therefore the Justices could not make a standing Rate; which last suit concessum per Holt C. J. By 43 Eliz. the Rate must be equal; ergo it ought to be continually altered, as Circumstances alter. The Justices cannot confirm an old Rate; in this their Order is naught. Tho' the Sessions need not give a Reason for their Order, yet if they give a Reason which is wrong, we must be guided by it, and quash the Order, because it appears to us to be no Reason.

*Between the Inhabitants of Suddlecomb and Burshaw.* Trin. 13 W. 3.

(11.)  
2 Salk. 491.  
6 Mod. 163.

AN Order of Justices setting forth, Because it was complained of by the Church-wardens, that the Person removed was likely to become chargeable; therefore they did Order, &c. Exception was taken to it, for that it was not adjudged so by the Justices.



Holt C. J. The Justices cannot remove a Man, unless he be likely to become chargeable to the Parish; for otherwise they might remove a Person of an Estate; and there is this Diversity, where the Order is, Whereas it appears to us, on the Complaint, &c. that R. S. is likely to become chargeable, &c. that will be well enough; but where it is as here, Whereas Complaint has been made, that he is likely, &c. that is ill: This Case was agreed to be referred to the Judge of Assize.

1 Sid. 99.  
1 Lev. 84.  
Raym. 65.  
1 Show. 76.

*Inter the Inhabitants of Mynton and Stony Stratford.* Mich. 13 W. 3.

Per Holt C. J. **I**F on Appeal to the Sessions, an Order be discharged, that Judgment binds only between the Parties. But when upon an Appeal an Order is confirmed, that is conclusive to all Persons, as well as to the Parties. It was also held, That a Parish in Reputation is liable, if there be Officers, i. e. Church-wardens.

( 12. )  
2 Salk. 527.  
2 Salk. 486,  
524.  
1 Vent. 310.  
2 Salk. 492.  
5 Mod. 417.  
6 Mod. 269,  
287.

Anonymus. Pasch. 1 Ann.

**H**ospital Lands are chargeable to the Poor, as well as others. Per Holt C. J.

( 13. )  
2 Salk. 527.

*Between the Parishes of Farringdon and Wilcor.*  
Pasch. 1 Ann.

**A** Servant-man coming into the Parish of F. was there hired for a Year, and having served Half the Time, married a Woman in the Parish of W. The Question was, Whether the Justices, on Complaint of the Church-wardens, could make an Order to remove him to the Place of his last legal Settlement; or if his serving there would not gain a Settlement?

( 14. )  
2 Salk. 527,  
528, 529.

Holt C. J. The Contract being good, the Justices have no Power to remove him from his Master before the End of the Year; for they cannot annul an Agreement between Master and Servant, unless it be upon Complaint of the Master: And tho' it is here said, that the Statute makes the Party's being unmarried, a Qualification as well as his Stay, viz. If any such Person, being unmarried, is hi-

red, &c. such Service, &c. So that the Woids such Service go to all, the Stay and the State of the Party; I hold it otherwise, for such is only such Service, and the Marriage doth not hinder the Service; the Contract continues, and on serving out the Year he gains a Settlement.

2 Salk. 533.

See Stat.

12 Ann. c.18.

If an Apprentice serve his Time with a Master who is only a Lodger, and hath no Settlement in the Parish; it has been held, that the Apprentice is well settled in that Parish, for he is not a Person removable, nor does his Settlement depend on his Master, as that of a Wife on her Husband; but he gains a Settlement for himself with-  
in 14 Car. 2. by forty Days Inhabitation.

*Inter the Parishes of All Saints and St. Giles in Northampton. Trin. 1 Ann.*

(15.)  
2 Salk. 530,  
531.

ONE born at A. came and lived at B. some Years, but never gained any Settlement there, then removed to C. for Convenience of getting his Livelihood, and B. gave him a Certificate according to the late Act. The Man became chargeable, and was sent back to B. who found that he was last legally settled at A. and sent him thither.

Et per Holt C. J. The Reason of the Act of Parliament about Certificates, was only to encourage Parishes, where poor Persons were minded to go, to receive them; and therefore it enacts, That when the poor Person shall be chargeable, the Parish which gave the Certificate shall receive and provide for him as a settled Inhabitant; which Woids lay an Obligation upon the Parish which gave him the Certificate to receive and provide for him, against that Parish which they gave the Certificate to: But as to all other Parishes they are as they were before. 2 Salk. 535.

*The Parish of Cumner versus Milton Parish.*  
Trin. 2 Ann.

(16.)  
3 Salk. 259.  
Mod. Caf. 87.  
Comber. 381.

UPON a special Order of Sessions removed into this Court by Certiorari, it appeared that a Man settled at C. having Children born in that Parish, afterwards removed to M. and rented a Farm of 10 l. per Ann. by which he gained a Settlement there; and becoming very poor, his Children born in C. were by an Order of two Justices sent thither, they being under seven Years old, and the Justices

Justices apprehending that to be their Place of then lawful Settlement.

Holt C. J. Where a Bastard is born, that is the Place of his Settlement, unless there is some Trick or Fraud to charge the Parish; but the Place where legitimate Children are born, is not the Place of their Settlement, for let that be where it will, the Children are settled where their Parents are settled: As for Instance; if the Father is settled in the Parish of A. but goes to work in the Parish of B. and before he gains any Settlement at this Place, has a Son born in B. and then dies; this Child shall be sent to the Parish of A. because 'tis not the Birth, but the Settlement of the Father that makes the Settlement of his Child; and if the Father hath gained a new Settlement for himself, as he has done in this Case, he hath likewise acquired a new Settlement for his Children, who do not go with him to such new Settlement as Nurse Children, but as Part of his Family. But where a Man is settled in the Parish of A. and has Children born there, and dies, and afterwards the Mother of these Children marries a Husband, who is settled in another Parish; in this Case the Children shall go along with her, not as Part of her Family, but as Nurse Children, to be maintained at the Charge of the Parish wherein born, and where their Father, whilst living, was settled; and to that Parish they may be sent after seven Years old, as to the Place of their legal Settlement: For this accidental Settlement of the Mother, being only by her Marriage with a second Husband, with whom she is now become one Person, shall not gain a Settlement for her Children.

Here the Settlement of the Man at M. is a Settlement to his Children. The Order was quashed.

The King *versus* Parish of Littleport. Tawney's Case. Hill. 2 Ann.

Tawney, being Overseer of the Poor of that Parish in the Isle of Ely, had disbursed several Sums of his own Money for Relief of the Poor before any Rate made; after, and before the End of the Year, he was turned out of his Office by the Justices; whereby he lost the Opportunity of making a Rate to reimburse himself: And now a Mandamus was directed to the Church-wardens and Overseers,

(17.)  
Mod. Cases  
97, 98.



seers, &c. to make a Rate for re-imbursing him what he had been out of Pocket on Account of the Poor.

Holt C. J. The Statute 43 Eliz. appoints a Method for Relief of the Poor, viz. That the Church-wardens and Overseers, and such Inhabitants as they shall call to them, shall make a Rate; but here the Officer begins the wrong Way, he advances Money without any Rate made, and thereby may oppress the Parish with too great a Charge: And in the right Course, if any sudden Charge comes after a Rate made, there ought to be a new Rate for that; tho' I do not think but a Rate may be made after the Poor are relieved, but then it ought to be for Levying the Money for the Poor, and not for the Overseer; and yet it is reasonable that the Overseer should thereout satisfy himself for what he before expended; but still he must account with the Justices: And this is not like the Case of a Bastard-Child, for there is no Method of raising, or laying the Money out in that Case. The Overseer had no Necessity to advance a Farthing of his own Money, for the Church-wardens and Overseers of the Poor may make a Rate whether the Parish will or not, so as it be confirmed by Justices of the Peace; and if any refuse to pay such Rate, it may be levied by Distress, and there ought to be a monthly Rate, because Possessors of Houses and Lands are to pay, and Possessions often change. In this Case the Overseer trusted where he need not have done it; he has not pursued the Means the Statute gave him, and we cannot relieve him.

Per Cur': The Writ of Mandamus was quashed.

*Inter the Parishes of Westbury and Coston. Hill.*  
2 Ann.

(18.)  
2 Salk. 532.  
2 Salk. 427,  
485, 528.

A Woman big with Child was removed by Order of the Justices from Westbury to Coston; and pending the Order, before the next Quarter-Sessions, she was delivered of a Bastard-Child. Coston appealed, and the Order was reversed; but the Child was sent back to Coston, as the Place of its Birth.

Et per Holt C. J. Tho' here be no Fraud, here was a wrongful Removal, and the Reversal makes all void ab initio.

Tracy *versus* Talbot. Trin. 3 Ann.

**T**HE Tenant of Part of a House was rated to the Poor as an Inhabitant, and distrained for a Quarter's Rate on a General Warrant made for the whole Year; on which Distress, he brought a Replevin in this Court. (19.)  
 2 Salk. 532.  
 3 Salk. 260.  
 Mod. Cases 214.

Holt C. J. here ruled, That if two Houses are inhabited by several Families, who have but one common Door and Entrance for both; yet in Respect of their Original, both Houses continue rateable severally, being at first several Houses; and if one Family goes, one House is vacant: But where one Tenement is divided by a Partition, and inhabited by different Families, viz. the Owner in one Part, and a Stranger in another; these are likewise several Tenements severally rateable, while thus divided; but if the Stranger and his Family go away, it becomes one Tenement again. And the Tenant here ought not to be rated for the whole Quarter, for Poor's Rates are to be assessed monthly by the Statute; and by this Means a Man cannot move in the Middle of a Quarter, but he must be twice charged: And he cannot be distrained by a General Warrant, but there ought to be a Special Warrant on Purpose; also a Distress should not be taken for a Quarter's Rate, before the Quarter is ended.

To this last the Jury said the Custom was otherwise; and in another like Case, the Chief Justice held, that strictly a new Warrant for Distress should be made upon Refusal, &c. but the Practice having been, with Respect to these Rates, to grant such a conditional Warrant to distrain, Communis Error facit jus. Comber. 342.

The Justices cannot make a Standing Rate for the Poor, for Lands may be improved, and the Rate must be equal; therefore it ought to be continually altered, as Circumstances alter, otherwise, tho' it might be just at first, it may be unequal now. 2 Salk. 526.

Anonymus. Hill. 4 Ann.

By Holt C. J. **I**N the Proceedings of Justices of Peace upon the Statute for removing a poor Person, the most regular Way is to make a Record of the (20.)  
 1 Salk. 406.  
 Com-

Complaint and Adjudication, and upon that to grant a Warrant under their Hands and Seals to the Church-wardens, to convey such Person to the Parish where he ought to be sent; and then to deliver in the Record by their own Hands into Court the next Sessions, to be kept there among the Records, and to charge the Parish: Which Record may be well removed hither, by a general Certiorari to the Justices.

The Queen *versus* The Inhabitants of Buckingham. Pasch. 5 Ann.

( 21. )  
2 Salk. 534.

2 Salk. 478,  
523, 524, 556.  
1 Show. 12.  
Comber. 282.  
5 Mod. 330,  
331, 454.

**H** a Poor Person went to Buckingham and took Part of a House of W. T. at 3 l. per Annum, and was to pay no Taxes for it, but the Lessor was; and this Apartment before the Taking, and while he continued in it, was distinct from the rest of the House, and taxed as a House of it self; and the Tax was laid upon the Lessor; and while H. lived there, he took his Freedom in the Corporation, and once voted as a Freeman at the Election of Bailiffs for the Corporation. The Quarter-Sessions adjudged this a good Settlement. But it was quashed in B. R.

Per Holt C. J. and Powell J. Coming into a Parish and being tared in a Parish, make a good Settlement without a Notice in Writing, within the Statute Jac. 2. But the Law is altered by 3 & 4 W. & M. and as to Voting, they could not take Notice that that implied a Settlement, a bare Residence might perhaps intitle him to that; it was an Act that related to the Corporation, and not to the Parish.

P O S T - O F F I C E.

Lane *versus* Cotton & al'. Pasch. 12 W. 3.

5 Mod. 455,  
456.  
Carrhew 487.  
1 Salk. 17.

**T**he Plaintiff brought an Action against Sir Robert Cotton, Postmaster General, wherein he declares, that he sent a Letter by the Post directed to one Jones at Worcester, in which there was inclosed an Exchequer-Bill, and that this Letter and Bill



were lost: Upon the General Issue pleaded, the Special Matter was found, viz. That the Letter and Bill were delivered at the Post-Office at London, into the Hands of one B. who was appointed by the Defendant to receive the Letters, and had a Salary; and that the Letter was opened in the Office by a Person unknown, and the Exchequer-Bill taken away, &c.

Holt C. J. It will be very hard upon the Subject, if this Action shall not lie; the Crown has a Revenue of 100,000 l. per Annum for the Management of this Office, and therefore Care ought to be taken that the Letters be safely conveyed, and that the Subjects should be secure in their Properties: The Post-master General is liable, because the Care of the Whole is committed to him, and the Rest are but his Deputies; and the Law makes the Officer, whoever he be, answerable both for himself and his Deputy, for the Act of the Deputy is adjudged the Act of the Principal, who may displace him at Pleasure; and there is no need of a Contract, because the Law makes him answerable. Here the Post-master has a Reward or Fee, which is the Reason in the Case of Carriers, Haymen, &c. who are bound to carry Things safely, and answer all Neglects of those that act under them; and if they could not be charged, without assigning a particular Neglect, they might cheat any Man of his Goods, by keeping a Correspondence with Thieves, and he should never be able to prove it: It would be unreasonable in this Case to put the Plaintiff to prove any particular Neglect, among such a Multitude of under Officers; therefore the Post-master is charged with it. The Words of the Statute for erecting the Post-Office are General, any Packets whatsoever; so that Exchequer-Bills are proper to be sent this Way: And 'tis hard indeed, that any Person should be excluded by Act of Parliament from sending his Letters by any other Carrier, against whom he might have Remedy, without this Act, or before it; and yet not have his Remedy against the Post-master, by whom he is obliged to send his Letters. But I am of Opinion, tho' the Post-master be liable, that B. is chargeable also; not as an Officer, but a Wrong-doer: For 'tis upon this Reason, that Action of the Case lies against the Gaoler, as well as against the Sheriff, upon a voluntary Escape.

The three other Judges held, that this Action lay not; because the Office is for Intelligence, and not for Insurance; and for that B. is an Officer, and he is answerable; and

1 Inst. 89.  
1 Roll. Rep.  
63.  
Moor 135.  
4 Rep 4.  
12 Car. 2.  
c. 35.

'tis

'tis impossible the Post-Master, who is to execute the Office in such distant Places, and at all Times, by so many several Hands, should be able to secure every Thing.

To this it was answered by Holt C. J. That when a Man takes upon himself a publick Imployment, he is bound to serve the Publick as far as his Imployment goes, or an Action lies against him; for his Undertaking is in Proportion to his Power and Convenience.

But Judgment was given for the Defendant.

## P R E S C R I P T I O N .

Duppa *versus* Gerrard. Mich. 1 W. & M.

Carthow 95.

**S**IR Thomas Duppa and others, Gentlemen-Ashers and Daily Waiters to the King, brought an Assumpsit against the Defendant, in which they declared, that all Gentlemen-Ashers Daily Waiters, &c. Time out of Mind had used to have a Fee of 5 l. of every Person who voluntarily accepted the Honour of Knighthood; and that the Defendant (on such a Day) had voluntarily accepted Knighthood, and thereupon became indebted to them in five Pounds; and in Consideration thereof (on such a Day) had promised to pay the Money, which he had not performed.

And upon a Demurrer to this Declaration, it was adjudged, that this Action would lie for this Duty; and thereupon the Plaintiffs had Judgment.

## PRESENTATION.

The King and Queen *versus* The Bishop of London and Dr. Lancaster. Intr. Hill. 4 & 5 W. & M. Rot. 964.

**Q**UARE Impedit to present to the Vicarage of St. Martin in the Fields in Com. Midd', and counts that Henry Bishop of London was Tenant in Fee in Gross, and collates Thomas Lamplugh, who was created Bishop of Exeter; whereby it belonged to the King to present, and he presented Lloyd, who was made Bishop of St. Asaph; wherefore the King presented Tennison, who was afterwards made Bishop of Lincoln, and so it belonged to the King to present by his Prerogative; and that the Defendants disturbed him. The Defendants plead in Abatement, Variance between the Writ and the Count; for the Count says, that the King ought to present by his Prerogative, which is not mentioned in the Writ; but non allocatur; for the Writ is always general, and there is no other Form; but the Prerogative is always mentioned in the Count; therefore a Respondeas ouster was awarded; and then the Bishop demurred upon the Count. D<sup>r</sup>. Lancaster pleaded in Bar, confessing the Seisin and Collation of Lamplugh, and all the Presentations alledged by the King, and then pleads the Stat. 25 H. 8. of Dispensations; and that Decemb. 20, 1693, D<sup>r</sup>. Tennison was elected Bishop of Lincoln, and that Decemb. 22, 1693, the Archbishop of Canterbury granted him a Dispensation to hold St. Martin's in Commendam, till the first of July then next following; and that Decemb. 23, 1693, the King confirmed it; and Decemb. 25, 1693, Tennison was confirmed and consecrated: And avers, that the Dispensation was not contrary to the Word of God, and that it was such as (before the Statute) was made at Rome; and that Tennison held the Vicarage till July 1. when, by the Limitation of the Dispensation it became void; whereupon the Bishop of London collated the Defendant D<sup>r</sup>. Lancaster, whereby he was and yet is Vicar. The King's Attorney joins in the Demurrer with the Bishop, and demurs on the Plea with D<sup>r</sup>. Lancaster. And the Points made in the Case were three; 1. Whether the King had

(1.)  
3 Lev. 377.  
&c.  
4 Mod. 200.  
Parl. Cases  
164.  
3 Lev. 382.  
More 522.

Vaugh. 19,  
20.  
Davis 68.

In 1 Shower  
there are  
long Arguments on this  
Case and the  
next.



any Prerogative at all, to present to the Church of a Subject, on the Promotion of his Clerk to a Bishoprick? 2. Admitting he had, yet whether he had it toties quoties, as here he had it three Times one after another? 3. Admitting he had, yet whether his Prerogative were not satisfied by the Dispensation to Tennison.

Holt C. J. and Eyre J. were upon the first Argument strongly for the King in all the Points. Dolben J. was strongly to the contrary. But Gregory J. said nothing: And it was afterwards adjudged for the King in all the Points.

The King and Queen *versus* The Bishop of London and Birch. Intr. Hill. 3 W. & M. Rot. 965.

(2.)

3 Lev. 382.

S. C. 2 Salk.

540.

4 Mod. 190.

1 Show. 164.

THE Pleadings and Demurrers were the same here as in the foregoing Case; and the first and third Points here were the same as in that, but the second Point of toties quoties was not in this Case. But a third Point was in this Case, which was not in the other, viz. that this being a Church newly erected by Act of Parliament, and the Presentments thereto being specially appointed by the Act, viz. the Bishop of London to have the first, and the Lord Jermin the second, and so of the Rest alternis vicibus for ever. And this being without any Saving of the King's Prerogative, Quære, Whether the King were not excluded from his Prerogative in this Case? For it was said, that an affirmative Act of Parliament creating a Thing de novo, which was not in esse before, implies a Negative, and shall be taken as if it had said, that the Bishop of London shall present, and not the King, as Hob. 289. and divers other Books are. Also the King shall be bound by this Act, being made for Religion, though he be not expressly named. 5 Co. 24. 11 Rep. 67. Also the King and the Bishop cannot both present for the same Turn, and the Act saying that the Bishop shall present, from thence it follows, that the King shall not present. And to this Opinion Holt C. J. at the first seemed to incline; but it was afterwards resolved, that this Act only directed the Method and Turns of presenting between the Patrons themselves, but did not exclude the King of his Prerogative; as where Lands are entailed by Act of Parliament, they are yet subject to such Bars as other entailed Lands are. And although this Church be

newly

newly erected, yet the King having this Privilege in all Churches before, he had it also in this when it was erected.

Note; The same Counsel were in both Cases, and both were argued at the same Time, and the same Judgment was given for the King.

## Privilege of Persons.

Skinner *versus* Crouch. Mich. 1 W. & M.

**T**RESPASS brought by J. S. against the Proctor of the University, for Goods seized by him going down the River to Sturbridge-Fair, the Duty to the University not being paid for them. The Defendant pleads the Privilege of the University. The Action abated by the Plaintiff's Death; his Executors bring another Action against the same Defendant for the same Trespass; the Defendant at the Time of this Action brought, having left the University; now the Defendant prayed that the Privilege of the University might be allowed him, upon Motion, and that he might not be put to the Charge of pleading it. (1.) Com. 171; 172.

Holt C. J. Privilege respects the Person, not the Cause, and you ought to plead it; and then it will properly come before us, whether the Defendant, not being a Member of the University at the Time of the Action brought, is intitled to his Privilege, for that he was a Member at the Time of the Fact done.

Ruled per Cur', that the Charter be pleaded.

Scawen *versus* Garret.

**T**HAN an Action in B. R. the Defendant pleaded, that he was an Attorney in C. B. On Demurrer, Mr. Ward objected, that he ought to produce his Writ, and conclude with a prout patet per Recordum; and also that he laid no Venue, alledging no Place where he was Attorney, nor where the Court of Common Pleas sits. (2.) 2 Salk. 549.

Et

Et per Holt C. J. to which the rest assented; It is well enough. 2dly, There is no Need of a Venue to try where he was Attorney, for it being a Matter concerning his Person, was triable where the Writ is brought. As to the 3d, he wondered how that ever came to be allowed, for that this Court sends Writs to the Chief Justice of the Common Pleas, by that Name; and unless where this is held to be Part of the Description of a Record, it can never be necessary.

Vide 1Saund.  
67.  
Farell. 97.  
6 Mod. 114.  
5 Mod. 310.  
1 Salk. 6.

Stevens *versus* Squire. Trin. 7 W. 3.

(3.)  
Skin. 582.

A Plea of Privilege was pleaded by the Defendant, as Clerk to one of the Prothonotaries, in this Manner; Et prædict' Def. dicit, without saying Venit & dicit, or making any Defence, &c. which was objected to be ill.

Holt C. J. As to the Objection to the Pleading, it is of little or no Regard. If a Prothonotary, or other Person who is privileged by Record, plead his Privilege, and bring a Writ attesting it, that is conclusive, and the Plaintiff may not traverse it; but otherwise it is of a Clerk, or Servant to such privileged Person. In the Case of Keckwith and Wheely this Term, the Defendant pleaded his Privilege as an Attorney of C. B. and made no Defence.

Duncombe *versus* Church. Mich. 8 W. 3.

(4.)  
1 Salk. 1.

THE Defendant pleaded, that he was an Officer of the Court of Common Pleas; and no Officer of that Court can be sued præterqu. coram Justic' de C. B. The Plaintiff replies, that at the Time of exhibiting the Bill, the Defendant was in Custody of the Marshal, in a certain Plea of Debt at the Suit of another; on this there was a Demurrer.

Holt C. J. Though a Bill be filed against him as in Custody, he may plead his Privilege: The Difference is, where a Person is here actually in Custody, he is liable to all Actions; but if he be only upon Bail, Privilege may be pleaded, for the Sheriff cannot take Notice of his Privilege, so that he must give Bail. And it has been resolved, that the putting in of Bail is no submitting to the Jurisdiction of the Court, whether it be general or special Bail; for until the Bail be put in, the Defendant is not in Court

3 Lev. 343.  
2 Roll. Abr.  
275.



to plead any Thing, nor is the Plaintiff obliged to declare against him.

Baker *versus* Swindon. Mich. 10 W. 3.

By Holt C. J. **P**RIVILEGE is either of Court, or of Process; in the Court of Common Pleas, <sup>(5.)</sup> <sub>3 Salk. 283</sub> every Person who belongs to that Court, such as Attornies and their Clerks, &c. shall have Privilege of being sued there, and not elsewhere, which is the Privilege of Court: But none shall be allowed Privilege of Process, but those who are Officers of the Court, and supposed to be always there. And in C. B. there are two Sorts of Privileges; the one is of the Officers of that Court, to be sued there by Bill, and the other of their Clerks to be sued there and not elsewhere by Original.

Clifton *versus* Swezeland. Mich. 1 Ann.

**H**ERE the Defendant pleaded the Privilege of the <sup>(6.)</sup> <sub>Farrell. 106.</sub> Common Pleas in Abatement, without concluding to the Record; to which Exceptions were made.

Holt C. J. He need not do it, but may leave the Plaintiff Liberty to reply, and deny his being a Person privileged there, which the Plaintiff cannot do if the Defendant concludes to the Record; his not saying prout patet is no good <sup>See 2 Show. 145.</sup> Cause of a general Demurrer. And upon the prout patet per Recordum shall go a Certiorari to certify the Record; and if they produce one, and shew he is privileged, the Plaintiff is stopped thereon.

Dillon *versus* Harper. Trin. 2 Ann.

**O**N a Special Demurrer, where an Attorney pleaded <sup>(7.)</sup> <sub>2 Salk. 545.</sub> his Privilege, for not concluding the Plea with a Profert of a Writ of Privilege, testifying his being an Attorney, &c.

Holt C. J. If Privilege of an Attorney be pleaded with a Writ, the Defendant cannot be denied to be an Attorney: If without, he may, and then Certiorari shall be awarded to certify whether he be an Attorney or not. An Attorney may plead Privilege with a Profert of his Writ, if he will; or

with an Exemplification of the Record of his Admission; or he may plead generally, that he is an Attorney of C. B. &c. and it will be well enough; for so are the Precedents.

Comb. 319.

An Attorney pleads his Privilege, in an Action of Debt *qui tam*, it shall be allowed; but not in an Information against him.

## Privileged Places.

Brown *versus* Burlace. 9 W. 3.

(1.)  
3 Salk. 45,  
285.  
Skins. 684,  
&c.

**A**N Arrest was made upon the Defendant in the Temple, and he moved by his Counsel that it might be set aside, for that the Temple is privileged from Arrests by the King's Grant, as appears by Dugdale and Stow's Chronicle.

Holt C. J. It is a Question whether the King hath made any such Grant, but if he has it is void in Law, they having no Court of Justice within themselves there: The Temple it is true, is a Place extraparochial, and not within any Parish, nor within the City, so as to be under the Customs of it; but it is within the County of the City. And White-Friars is within the Jurisdiction of the City of London. In this Case the Court would not set aside the Arrest; so the Defendant was held to Special Bail; yet they seemed not to countenance Arrests in the Temple, especially in Term Time.

Elderton's Case. Mich. 2 Ann.

(2.)  
Mod. Caf.  
73, 75, 76.

**E**Lderton and others were taken up and committed by the Board of Green-Cloth, for executing a *Fieri facias* in Whitehall, upon a Complaint of a forcible Entry into a House in Scotland-Yard, in Contempt of the Privileges of the Queen's Royal Palace, and without Warrant, &c.

Upon a Habeas Corpus brought, it was insisted to be a lawful Execution of the Writ, and not prejudicial to the Privilege of the Palace; and that admitting it was a Breach of the Peace, the Court of Green-Cloth had no Power to commit this Person, because he was not the

Queen's

Queen's Servant; and that Court hath only Authority over the Queen's Family, for the Government and ordering her menial Servants. To this it was answered, that there was a standing Commission of the Peace for the Verge and Palace, and the Officers of the Green-Cloth are always Commissioners; and the Queen may declare any House to be a Royal Palace under the Great Seal, after which it is a Palace, though she doth not reside there.

Holt C. J. It need not appear in the Warrant of Commitment that they were Justices of Peace, but it is always upon the Return. And the Matter here is only this, whether the Fact being done within the Queen's Palace, and it is not said that the Queen was actually residing there, i. e. If the Privilege be not confined to the Residence? And then another Question will be, in Case it be so confined, what will amount to a Residence? For suppose the Queen be at Windsor, or other distant Palace, and a Murder is committed at Whitehall, shall the Lord Steward judge of it on the Statute of H. 8. I hold that he shall not. I agree it is a great Contempt to arrest any Person in the Queen's Palace, to the Disturbance of the Queen, or her Servants; and the Consequence might be very dangerous, to suffer a Number of rude Fellows, under Colour of Process, to enter into the Royal Palace. But I am of Opinion, that where the Queen is totally absent, and neither present by herself, or by any of her Domesticks or Family, the Place hath no Privilege, though it is otherwise where it is only a personal Absence for a short Time; and the Queen at this Time was at Windsor.

The Prisoners were remanded, and ordered to be brought up two Days after for Bail.

1 Mod. 76.  
1 Vent. 169.  
2 Mod. 181.  
1 Lev. 106;  
107.  
1 Sid. 211.  
Cro. Car.  
272.

P R O C E S S.

Allen *versus* Brookbank. Trin. 11 W. 3.

**A** Citation for Incontinency to the Spiritual Court was served on the Sunday, and fixed on the Church Door. It was objected to be void, by 22 Car. 2.

2 Salk. 629.

Holt C. J. That Statute extends not to this Process, nor to Summons at the Church, but only to such Process which may as well be executed at any other Time.

P R O.



# PROHIBITION.

Quilter *versus* Newton. Trin. 2 W. & M.

(1.)  
Carthew  
151, 152.

**N**ewton, one of the Church-wardens of St. Botolph's, London, libelled against Quilter for stopping the Church Door and Windows, by Sheds, &c. built (as he supposed) upon Part of the Church-yard.

Motion for a Prohibition, upon a Suggestion, that the Conusance of Lay-Fees appertain to the Temporal Courts, and that Sir Charles Humphrevile was seised in Fee of a Messuage and Curtilage near the Church-yard, as of his Lay-Fee, &c. and that Newton had libelled for building upon the Church-yard, ubi revera the Sheds, &c. were not built upon any Part of the Church-yard, but upon a Lay-Fee; and this was held a good Suggestion, because it was averred, that the Sheds did not stand upon any Part of the Church-yard.

Anonymus. Anno — W. 3.

(2.)  
3 Salk. 289.

Plowd. 472.  
Reg. 71.

**I**n Cases of Prohibitions, the ancient Course was, where they were granted upon Motion, for the Party prohibited to sue out a Scire facias, Quare consultatio non debet concedi post Prohibitionem; in which Writ the Suggestion was recited, and also a Prohibition granted thereupon, ad damnum of the Party: Afterwards this Practice was altered, and the Course came to be, on granting a Prohibition to the Plaintiff, that the Court bound him in a Recognizance to prosecute an Attachment of Contempt against the Defendant, for suing in the Spiritual Court after Prohibition granted, and then to declare upon the Prohibition; so that he, who was Defendant in that Court, is now become Plaintiff in the Court above. Per Holt C. J.

Nelson *versus* Hawkins, Dean of Chichester.  
Mich. 8 W. 3.

**I**N Prohibition; the Plaintiff declared, that the Defendant libelled against him in the Spiritual Court for calling him Knave; whereon the Defendant demurred. (3.) Cases W. 3. 104.

And per Holt C. J. It will be hard to grant a Consultation. The Party has not accused the Dean of any Dishonesty in his Profession, which may make him liable to Ecclesiastical Censures; if he had so done, it would have been reasonable to let him sue there; but now the Case is only, whether we must be more tender of the Reputation of a Clergyman than that of another Man, for which there is no Reason. The Reason why laying violent Hands on a Clergyman was punished by Excommunication, was because he having Habitum & Tonsuram, by which he was known to be such, an Assault on him was deemed an Assault on the whole Clergy; and so a Kind of Spiritual Offence.

And in Hill. Term the Court gave Judgment, that the Prohibition should stand.

Grimes *versus* Lovel. Mich. 10 W. 3.

**L**ibel in the Spiritual Court for these Words, You are a damn'd Bitch, Whore, and a pocky Whore, and if you have not the Itch, you have the Pox; and moved for a Prohibition, because an Action lies at Common Law. And a Difference was taken, where the Word Pox could not be intended but of the French Pox, by the Words that were joined with it; there Action lies. (4.) Cases W. 3. 242.

And Holt C. J. said, that where the Word Pox was joined with the Word Whore, it should be intended of the French Pox. A Prohibition was granted.

Godfrey *versus* Lewellin. Trin. 11 W. 3.

**W**here the Matter suggested for a Prohibition appears on the Face of the Libel, an Affidavit of it is not required; but if it doth not appear there, or if you move for a Prohibition as to more than appears upon the Face of the Libel, to be out of their (5.) 2 Salk. 342. 551. Parrell 131.

Hob. 79.  
1 Lev. 235.

Jurisdiction, you ought to have Affidavit of the Truth of the Suggestion. And in another Case he said, Where-ever the Writ which you suggest for your Prohibition is foreign to the Libel, it must be pleaded below, before you can have a Prohibition; it is otherwise where the Cause of Prohibition appears on the Face of the Libel. Also where it doth appear in the Libel, or by the Proceedings in the Cause, that the Consuance of it doth not belong to the Spiritual Court, a Prohibition may be moved for and granted after Sentence; and this holds in all Cases, but when one is sued out of his Diocese, upon the Statute 23 H. 8. in which Case, by pleading you own their Jurisdiction.

Blank *versus* Newcomb. Mich. 11 W. 3.

(6.)  
Cases W. 3.  
327.

**L**ibel in the Spiritual Court, for not paying a Parish-Rate for Repairs of the Church; and suggested for a Prohibition, that all Parish-Rates were to be made by a Majority of the Parishioners; and that every Rate, made after it is once collected, becomes void; and that this was not by a Majority, &c. And that the Suit was to pay this in Pursuance of an old Rate collected many Years before.

As to the first, it is urged, its not being by a Majority of Parishioners, was a Writ only proper for an Appeal, and so is the Inequality of the Rate. 2 Bulst. 289.

As to the second, that this present Rate had indeed Reference to a former one which had been collected, but that was not to give any Force or Efficacy to the former, but only by way of Direction of the latter, according to Sir Robert Lee's Case.

Holt C. J. The right Course is for the Spiritual Court to give sufficient Notice to the Parish to meet, and make a Rate for Reparation of the Church, and for Neglect, &c. they may be excommunicated; but Ecclesiastical Courts cannot make a Rate, or appoint Commissioners to do it; and here the Suggestion recites an ancient Rate, which, they say, was to be a standing Order for all Times to come; and that they have confirmed that Rate; and that the Libel is for want of a new Payment according to it. Vide Noy 126, 131. in Point, for a Prohibition in this Case; and all that the Spiritual Court can do, is to make an Order that the Church be repaired, but not to assess a Quantum.



Stone *versus* Jones. Trin. 12 W. 3.

**L**ibel in the Spiritual Court, setting forth a Prescription (7.) for the Vicar of Marcham to find a Person to officiate Cases W. 3. 404, &c. in the Chapel of Garworth, an ancient Chapel within the said Parish, for the Ease of the Parishioners; in Consideration whereof the Parishioners, Time, &c. paid him and his Predecessors two Quarters of Wheat, and two of Malt, yearly. Upon Suggestion of no such Prescription, Prohibition was moved for.

Holt C. J. This is the very Point adjudged in William's Case, 5 Co. 72. for it is an Ecclesiastical Duty to be performed for the Advantage of the Parishioners; and though it commences by Prescription, yet it concerns Ecclesiastical Persons, and is a meer Spiritual Thing; and is not at all the same as if it were against a Layman; who is not so easily bound by Canon Law as Ecclesiastical Persons are; for their Proceedings there by Prescription shall not charge a Layman, or any Temporal Right. In the Vacancy, the Patron and Ordinary may grant a Pension, and the Parson shall be sued there for it; and upon the Statute of Circumspecte agatis, a Prohibition was never granted in that Case, though Coke in his Comment upon that Statute be of a contrary Opinion. Adjoin'.

Clay *versus* Sudgrave. Trin. 12 W. 3.

**T**he Executor of a Master of a Ship libelled in the Admiralty for Wages. (8.)

Holt C. J. held, 1st, That Prohibitions were not of Right, but Discretionary. He said, Hale and Wyndham were of that Opinion, but Kelynge differed. 1 Salk. 33. Carth. 518. by the Name of Clay *versus* Snelgrove.

2. That it was by mere Indulgence that Mariners were permitted to sue in the Admiralty for their Wages; because the Remedy there was easier and better. Easier, because they may join there; and better, because the Ship itself is answerable: But it is against the Statute expressly, tho' now 1 Sid. 63, 178. Hob. 67. 6 Mod. 26, 238. 2 Salk. 426. Communis error facit jus; yet it was never allowed the Master should sue there. The Mariners contract on the Credit of the Ship, the Master contracts on the Credit of the Owners.

Jones *versus* Stone. Trin. 12 W. 3.

(9.)  
2 Salk. 550.

JONES the Vicar of N. was libelled against in the Spiritual Court, for that by Custom Time out of Mind the Vicars of S. had, by themselves or others, said Divine Service in the Chapel of C. for which there was such a Recompence; and that he neglected. The Defendant for a Prohibition, without traversing this Custom, suggested that all Customs were triable at Common Law.

Farrell. 88.  
6 Mod. 230.  
F. N. B. 51. b.

Holt C. J. A Parson may be bound to an Ecclesiastical Duty by Custom; the Spiritual Court may punish him if he neglects that Duty. The Custom might begin by an Ecclesiastical Act. And a bare Prescription only is not a sufficient Ground for a Prohibition, unless it concerns a Layman; whereas here it is an Ecclesiastical Right, an Ecclesiastical Person, and an Ecclesiastical Duty, and the Prescription not denied.

Ballard *versus* Gerard. Hill. 13 W. 3.

(10.)  
Cases W. 3.  
608, &c.

THE Register of a Spiritual Court libelled there for Fees belonging to his Office, and Proceedings were carried to an Excommunication. A Prohibition was moved for, upon Suggestion that the Office of a Register is a Temporal Office, and by Consequence the Fees thereof only cognizable at Common Law. It was objected to be for Fees accruing for the necessary Exercise of his Office in Court, which were his sole Recompence, and so small from every particular Person, that to put him to an Action at Law, would be in effect to deprive him of them entirely; and some of them may be such for which there may be no Remedy at Law, as in Case of the Box-Honey of this Court, or the Fees of a Door-Keeper. And as to the Quantum of them, they are assessed by the Court; and any Court, ancient or new, that have necessary Officers, may ascertain Fees to them, and all those that use the Court shall be concluded thereby; and yet those Fees may be so small from each Person, that it may not be worth while to bring an Action at Law for them. And it was said, if one refuse to pay the Fee of the Door-Keeper, the Court shall commit him, and that was the only Remedy.

Holt C. J. contra: As to your Case of the Box-Money, he shall not have the Rule, if he does not pay for the Box; and we cannot justify committing one for not paying of Fees. Surely there must be an original legal Remedy, if there be a Right; and sure the Office of Register or Archdeacon is a Freehold, for which an Assize will lie; and if so, a Denial of the reasonable and usual Fees thereof, will be a Disseisin of his Office. And no Court has a Power of settling the Fees of its Officers, so as to conclude the Subject; but thus far they may go, as to judge what are reasonable Fees: And in a Quantum meruit by the Officer for such Fees, the Judge's assessing them reasonable may be good, but not conclusive Evidence to a Jury; and so of a Table of the usual Fees of a Court not newly erected; and after it is once found reasonable by a Jury, then it may become conclusive Evidence; and so it has been adjudged, 15 Car. 2. between Beal and Prior, for the Fees of the Register of the Office of Insurance; vide Hard.—. However, he thought it very proper for a Prohibition, to have it settled judicially.

A Prohibition awarded.

Chambers *versus* Sir John Jennings. Hill. 1 Ann.

**L**ibel in the Court of Honour, for these Words, viz. You a Knight! You a pitiful inconsiderable Fellow! And a Rule was to shew Cause why there should not be a Prohibition.

Holt C. J. doubted whether there was or could be any such Court. No Precedent could be found of such a Suit for Words in the Court of Honour.

The Prohibition went absolutely.

(11.)  
2 Salk. 553.  
S. C. Farress.  
125.  
Vide Lutw.  
1053, 1054.  
Parliament  
Cases 58 to  
67.  
1 Show. 353.  
1 Lev. 230.  
4 Mod. 128.  
2 Hawk. 9, 10.

1 Sid. 353. 1 Keb. 310, 316, &c.

Galizard *versus* Rigault. Mich. 1 Ann.

**I**ndictment for assaulting, beating, wounding, and endeavouring to ravish the Wife of B. the Party was convicted, and afterwards the Husband brought Trespass for the same Cause; and now the Party being also libelled against in the Spiritual Court for soliciting her Chastity, moved for a Prohibition. A Prohibition was granted; for it being an Attempt and Solicitation to Incontinence, coupled with

(12.)  
2 Salk. 552.  
S. C. Farress.  
78, 79, &c.  
2 Lev. 63.



Palm. 379.  
2 Salk. 692,  
693.

1 Cro. 286.

1 Mod. 31.

2 Keb. 589.

1 Vent. 53.

Cro. Car. 393.

1 Sid. 438.

Force and Violence, it does, by reason of the Force, which is temporal, become a temporal Crime in toto.

Holt C. J. If one commit Adultery, and the Husband bring Assault and Battery, this shall not hinder the Spiritual Court; for it is a criminal Proceeding there, and no Indisment lies at Common Law for Adultery. 1 Roll. Abr. 295. 2 Inst. 488.

Term. Hill.

1 Ann.

Farrell. 137.

Upon a Motion for a Prohibition to a Suit in the Spiritual Court for Cithre Wood.

1 Show. 158.

1 Sid. 65,

332.

2 Salk. 550,

551.

Holt C. J. One may prescribe in a Non Decimando of Wood, or plead that it is for Boughs, Loppings, &c. of Timber Trees of twenty Years standing; and if that Plea be denied below, it is good Cause of Prohibition: But if they receive and traverse it, they may try it here. If a Modus for Cithes be pleaded in the Spiritual Court, and admitted, no Prohibition shall go; but if the Question be, whether Modus or no Modus, a Prohibition shall be granted: All Customs are triable at Common Law; though a bare Prescription only is not sufficient Ground for a Prohibition, unless it concerns a Layman.

Anonymus. Hill. 2 Ann.

(13.)

2 Salk. 553.

1 Roll. Rep.

337.

Hob. 79, 213.

3 Bull. 51.

A Prohibition lies for denying a Copy of the Libel, to any Ecclesiastical Court; for the Ecclesiastical Courts are limited, and the Party ought to know whether the Matter be within their Jurisdiction, and how to answer. And when there was a Proceeding ex officio in the Ecclesiastical Court, if they refused to give a Copy of the Articles to the Party, a Prohibition should go quousque it were given. But for refusing a Copy of the Libel in the Admiralty, Prohibition lieth not; because it is not within the Statute. Per Holt C. J.

Mod. Caf.

156.

And there is a great Diversity between the Spiritual Court and the Court of Admiralty, in respect to Suggestions for Prohibitions; for the Admiralty has Jurisdiction from the Locality of the Cause of Action, and therefore for a Prohibition, though they lay it to arise super altum mare, yet the Party may suggest the contrary to oust them of Jurisdiction. But the Jurisdiction of the Spiritual Court is in respect of the Nature of the Thing, if that be Spiritual; as here Matrimonial, or Testamentary, &c.

Parker *versus* Clerk. Mich. 3 Ann.

A Parish Clerk commenced a Suit in the Spiritual Court against the Church-wardens for so much Money, by Custom due to him yearly; and now a Prohibition was moved for, on Suggestion of there being no such Custom. To which it was objected, that this ought to have been pleaded below; and if without receiving that Plea, they would proceed, then would be the proper Time for Prohibition.

(14.)  
Mod. Caf.  
252, 253.

Holt C. J. In this Case there is a Duty not Spiritual, but Temporal to a Parish Clerk; and we may grant a Mandamus to restore him to his Place, if unjustly removed: Likewise this Duty is founded upon a Custom; and if there be such Custom, he is not without Remedy at Law by Action of the Case. And though it is said that the Clerk is an Ecclesiastical Person, and in inferior Orders, and that as such, he might sue in the Spiritual Court for a Stipend or Pension; if they do not make him a Spiritual Person, which will be hard to do, they have not original Jurisdiction; and where they have not original Jurisdiction, it is never too late for a Prohibition.

2 Roll. Abr.  
227, 234.  
Cro. Jac. 670.  
Cro. El. 675.  
2 Inst. 487.

Gibbons *versus* Bishop of Cloyne. Hill. 4 Ann.

Doctor Lane and Doctor Floyd did this Day argue this Case; and Lane held, that Vicar Generals eo nomine had Power Institvere præsentatos sine speciali mandato Episcopali, for that he may do every Thing of Justice and Necessity; and the Patron may compel him to it, says Linwood; and others may institute as well as a Bishop, for after his Decease the Custos Spiritualium may do it. The Convocation made a Canon which is not binding, that Vicars General or Officials should not institute; which shews that the Opinion was they could institute; here is Institution and Induction de facto, so as the Case cannot properly be now before you: Besides, here the Bishop is Judex in propria causa, & si talis Judex judicaverit, tunc Judicium tale esset irritum & inane; and Judex in propria Causa is when the Judge has Commodum or Incommodum by the Matter in Question; and the Question here is of his own Authority, of his own Grant, and he is to have Fees by another Institution. It is not denied but a Bishop may promote a Suit

(15.)  
The Plaintiff being instituted by the Vicar General, the Defendant would afterwards attack that Institution in the Spiritual Court; but the same being after Induction, the Court of Law prohibited him.

in his own Court pro reformatione morum & salute animæ; being ex officio, but never when any Profit is to accrue to himself, &c.

Floyd said, that Institution does not pass to the Vicar without special Words in the Patent; so says Dinus de Regulis Juris Canon; nay, though he should say in the Patent, Pono te in loco meo ad faciendum operam quæ ego facere possum, yet this will not give him Power of Institution; Permocinus de officiis Ecclesiæ verbo Vicarius: So that as to this Point, it is very clear by all our Books, that the Vicar General, without special Authority from the Bishop, cannot institute. The Proceedings in the Spiritual Court were, I take it, regular; for the Plaintiff was cited coram me ipso & competente in hac parte iudice, so as the Bishop might not have sat there; and this is only the Style of the Court, and the Vicar and Bishop are but one Person. As to this contentious Jurisdiction, this is only a Violation of the Jurisdiction of the Court to take Offerings, and a Contempt of the Court; and every Court may punish any Contempt done to it. This can be no Benefit to the Bishop, the Sequestration being to the Use of a subsequent Incumbent, and there was nothing done below after the Prohibition.

Attorney General for the Plaintiff: If by Institution Power passes to the Vicar General, virtute officii, then it cannot be restrained; but I think the Bishops in Ireland cannot sequester Livings on the Death of any Incumbent, for by the Statute made in Ireland 28 H. 8. c. 8. it is enacted, that upon the Avoidance of any Parsonage, Vicarage, or Benefice, the King, out of the Profits thereof, shall find a sufficient and able Priest to serve the Cure, from the Time of such Avoidance till one be admitted and instituted to the same; so that the King is to have the Livings, and to provide one to serve the Cure; but otherwise in England, for by Statute 26 H. 8. c. 3. the Bishop is to take and receive the Profits, and is answerable to the King for the same; F. N. B. 52. g. and so the Bishop is to provide for the Cure. If the Tithes are set out, and they are taken by a Wrong-doer, then you sue for them at Law, for they become a Lay Chattel, 2 Leo. 101. 3 Cro. 607. besides, the Inheritance of the Parson is brought here to be tried by a Side-Wind in the Bishop's Court, which cannot try an Inheritance: Then he was in above six Months, therefore they cannot remove him but by Quare Impedit; so that quacunque via this cannot be tried in the Spiritual Court; so



is Hutton's Case. Hob. 15. 2 Roll. Rep. 6. Hinham and Grover's Case; so is 2 Roll. 292. pl. 1. 294. 13. for after Institution you are driven to your Quare Impedit. Here the Right of the Vicar General is questioned in the Spiritual Court, which cannot be, for that he has a Freehold. 2 Roll. 285. 36, 8. c. 47. 6. Besides, the Construction of Grants does not belong to that Court; 2 Brownl. 11, 12. 2 Roll. 285. 37. Lastly, Here the Bishop was both Judge and Party, which is not to be allowed by any Law in the World. 2 Roll. 93. 11. 12 Co. 114. 8 Co. 118. 6 Hard. 503. And the Case here is a Question in Point of Interest between the Vicar and the Bishop.

Sergeant Parker for the Defendant: The Judgment was well given; for what Method is there against a Parson that takes Oblations as Incumbent, but to sue him in the Spiritual Court, this being a Violation of the Episcopal Authority. It is true, when he pleaded Institution, then the Prohibition was well awarded; and when by the Judgment of B. R. in Ireland on the Special Verdict, the Court found there was no such Thing, then surely the Consultation was well granted. Whether the Sequestration in Ireland be good, surely is not now to be questioned, being the frequent Usage there ever since the Statute. And though the King be to nominate the Parson, that does not take away the Common Law of the Church, to sequester the Livings to the Use of the next Incumbent. One may be sued for the Profits of a Benefice in Time of Sequestration, and no Prohibition lies. 2 Roll. 293. 7. For there can be no other Remedy for the same. It is objected, that we shall not by any Side-Wind draw a Freehold in Question there; but suppose a mere Layman had given Institution, we should not be driven to the Common Law, for this is no more than if the now Plaintiff had pleaded an Institution in the Spiritual Court, when in Truth there was none: Nor did they proceed below any further, until it was found there was no Institution or Induction, and then they awarded a Consultation; and this was neither a good Institution nor Induction, all being coram non iudice, and void. As to the Judex in propria causa, this differs from that Rule, for that Bishop here has no Profit by that Matter, for this is a Citation for a Contempt, for which the Courts of Law will not punish. Moor 87. 9. And all the Bishops in Ireland may be held to be Parties, if it were before them, as the Bishop of Cloyne, for they all have Vicar Generals.

Holt C. J. The Bishop may sue the Sequestrator only. Suppose a Wrong-doer takes the Oblations, the Parishioner is not thereby discharged, no more than when Feme Lessor marries, after Lessee, not knowing of the Marriage, paid the Rent to the Feme, he was forced to pay the same again; 1 Lev. 6. If Induction be upon an irregular Institution, then you cannot avoid it. And thereupon he asked Dr. Floyd, Whether this Institution was void, or voidable? Who answered, If the same be not specially delegated by the Bishop, it is ipso facto void, and a Nullity in itself.

Powell: I have read some Canon Law Books, and they said, that a Vicar General might have Power of Institution, as incidental to his Office, but the Bishop might reserve that Power to himself; but I doubt the Bishop here is Judge and Party: For though he might sue for a Contempt, yet when he pleaded that he was Incumbent, then the Bishop should not proceed, for then he is to construe whether the Grant of his Vicar be good.

Holt C. J. That is only like the common Case; for when you libel for Cithes, and the Defendant pleads a Modus, the Court below are tied up, they can go no farther: But when it is found here, on a Prohibition, there is no such Modus, then we loose their Hands again, and they may go on, for we grant a Consultation. As to what is said, that the Bishop may sit in his own Court, and that the Vicar and he are but one Person; it is true, a Bishop may sit when he pleases in his own Court, but the Vicar, Chancellor, shall have Fees. Adjournatur.

Bishop of Cloyne *versus* Gibbons. Trin. 5 Ann.

(16.) THE Court were unanimously of Opinion to reverse the Judgment in Ireland for a Consultation, and that the Prohibition should stand.

Holt C. J. said, The Bishop could not cite Gibbons for taking the Money due on the Parishioners at the Time of the Sequestration; for the Bishop had the same Remedy for the Ecclesiastical Duties which the Incumbent should have had, and that is against the Parishioners, who possibly paid these Duties in their own Wrong. If the Ordinary appoints a Sequestrator, and if any disturb him, Trespass lies; Br. Ordinary 5. This is a good Induction de facto, and such Incumbent shall not be drawn into the Spiritual Court by Reason of the Institution.

Powell J. The Institution shall not be controverted after Induction in the Spiritual Courts; so their Foundation here of the Bishop is wrong, and he sues him as if the Sequestration was still in Being, and takes no Notice of the Institution nor Induction: And it is for retaining the Dues which should belong to the Sequestrator, which is ill, for the Sequestrator should complain. In fine, the Trial of Induction belongs to the Temporal Courts.

Powis J. They would bring the Trial of Induction ad aliud examen; the Parishioners should be sued for the Dues, and not Gibbons; but the Bishop takes the Parson for the Wrong-doer.

Gold J. Accordingly; for after Induction the Spiritual Court cannot try it; for that is in Truth only to try whether the Induction be good, which is cognizable at Law.

Judgment reversed.

Wilmett *versus* Loid. Trin. 5 Ann.

**L**ibel against the Defendant in the Spiritual Court at Worcester, for getting his Brother's Wife with Child; and he pays a Prohibition, because that he should be cited in York, for he went to live there a Year before he was cited, though it was after the Woman was said to be with Child; and that he has a Dwelling in Yorkshire, but coming to Worcester to chuse Parliament Men, he was served with a Libel.

(17.)  
Where a  
Prohibition  
ought to go,  
for citing  
out of the  
Diocese.

Holt C. J. said, If you appeal for Want of Jurisdiction, you may still have a Prohibition for that, because you contend the same: But if you appeal upon the Merits, or propter gravamen, though you insist on the Jurisdiction of the Court by Protestation, yet this shall be taken for an Admission of the Jurisdiction. If you sue for a Legacy, that is to be sued for in that Diocese where the Will was proved. Adjournatur.

Wilmett *versus* Loid. Trin. 5 Ann.

**T**HIS Case was argued by two Civilians, Floyd for a Consultation, and Dr. Lane for a Prohibition.

(18.)

Floyd argued, that the Plaintiff ought not to have a Prohibition, because that Wilmett did not appear in Person and plead to the Jurisdiction, but his Proctor only appeared, and alledged apud acta, as they call it in their Court



Court, (which is the same Thing as pleading *ore tenus* is with us,) that Wilmett lived under the Jurisdiction of the Archbishop of York; and he noted, the Words of the Citation are, *cum venerit responsurus*, which intimates that he was personally to appear, and being he did not, then was he justly sentenced for Contumacy. Then this is such a Crime as Incest, which was acted by Management, and such Secrecy, that it was properly to be answered by the Party in Person; therefore it being a Criminal Prosecution *ex officio*, he should personally answer; not like Causes between Party and Party, where the Party may appear, and plead *apud acta* by his Proctor. Then there is no Procuration appears to be on the Proceedings, (which is in Nature of a Warrant of Attorney in Law.) Now as to what is said, that the Offender was cited out of his Diocese, against the Stat. 23 H. 8. 9. this does not appear in this Case, for what is before this Court is right, viz. that Wilmett did commit Incest in the Diocese of W. and you have only the Allegation of Hill, who does pretend to be Proctor for Wilmett, that he lived in the Diocese of York; so that the Judge of W. had no Jurisdiction: Here it appears that the Crime was done in W. this gives a good Jurisdiction *prima facie*, he was found in W. and there cited; and differs much from the Cases intended to be remedied by the Statute, viz. when the Party is cited into a foreign Diocese; and it seems he was also commorant in W.

Lane said, *Cum venerit responsurus* are the Words of every Citation, being Words of Course. Dr. Floyd knows that it is the common Practice of the Prerogative Court to answer by Proctor, and yet no Procuration is required; but if the other Side do insist upon it, as they seldom do, then it is to be shewn. And when the Contest is about Administration committed before a Suffragan, the other Party, who would have Administration in the Prerogative Court, says there are *Bona notabilia*; the other Side will answer by his Proctor, There are not; and the Proctors can do therein as much as their Client can do. In some Cases Criminal heretofore the Party was to appear in Person, and answer, but even then the Attorney might give in an Issue, and there Articles were exhibited to the Criminal; to which then he was to answer in *scriptis*, or else was sentenced *contumacious*; but now that Course is laid aside; for first, the Criminal cannot, nor is to prove a Negative; next, this Sort of Proceeding was looked upon to be too like an Inquisition; therefore whoever is accused must exhibit and prove his Ar-

ticles. Here in our Case, though there is not an Appearance and Pleading in Person, and in scriptis, as they would have it, that could not be, for why should he plead to the Verits, that pleads a dilatory Plea, viz. to the Jurisdiction. It is true what the Doctor says, that committing a Crime gives a Jurisdiction, but that is *flagranti delicto*; but when he leaves the Jurisdiction, and then Processes are to be served, then the Habitation of the Criminal makes it subject to the Inspection of his proper Ordinary, or else they might proceed against the Woman to Sentence, and then certify her Condemnation to the Archbishop of York, who might send Wilmett to the Tribunal loci. Now it appears by the Libel, that the Crime was committed two Years before the Prosecution; then Wilmett went to visit his Mother or Friends, &c. to W. and they there did cite him; therefore this, not being *Flagranti delicto*, I think is not warranted either by Common or Statute Law.

Floyd said, this was in Nature of an Outlawry. But it was answered, Such Citation could never be without acquainting his proper Ordinary.

Holt C. J. took the Difference that Dr. Lane laid down, that a Suffragan Court may have a Jurisdiction when a Ban of another Diocese is taken *Flagranti delicto*, but here the Party goes into another Diocese, and is commorant there, and he comes back casually into the Diocese of W. if that be the Case, then the Citation cannot be good: For suppose a Ban comes casually into the Diocese of London, and commits a Crime here, and then goes back to the Diocese where he dwells, and then casually comes to London again, I do not think he can be here cited; but if he had been cited before he left London, then that would be *Flagranti delicto*.

Powell J. Suppose Wilmett had only lived in W. when this Crime was committed, and then before the Crime was found out he went to live in York, this perhaps shall not oust the Court of W. out of the Jurisdiction which was well begun there.

Holt C. J. contra, because a Citation is in Nature of a Process, which in its Nature cannot be of Force in another Diocese. But that Point was no more insisted upon, being out of the Case.

Holt C. J. Powis and Gold: This Case was too nice to be determined on a Motion, therefore let a Prohibition go, and let Wilmett declare forthwith. I am not giving any Opinion, said Holt C. J. but I think if the Ci-

tation be wrong, though that Wilmett did plead informally to the Jurisdiction, and also appealed, yet all the Proceedings below must fall to the Ground.

See Adultery, Church, Marriage.

## Promise Collateral.

Butcher *versus* Andrews. Pasch. 10 W. 3.

(1.)  
Carthew  
446.  
1 Salk. 23.

**C**ASE on several Promises; one was for so much Money lent by the Plaintiff unto R. A. the Defendant's Son, at the Instance and Request of the Defendant.

Upon Non Assumpsit pleaded, there was a General Verdict for the Plaintiff, and entire Damages; and now it was moved in Arrest of Judgment, that a General Indebitatus Assumpsit would not lie against the Defendant upon this lending of Money unto his Son; and the Damages being entire made all naught: And the Court was of that Opinion.

Sed per Holt C. J. If it had been an Indebitatus for so much Money paid by the Plaintiff, at the Request of the Defendant, unto his Son, it might have been good, for then it would be the Father's Debt, and not his Son's; but when the Money is lent to the Son, it is his proper Debt, and not the Father's.

Judgment was arrested.

Burkmire *versus* Darnel. Mich. 3 Ann.

(2.)  
6 Mod. 248,  
&c.

**I**N Case; the Plaintiff declared, that in Consideration that at the Request of the Defendant, he would let a certain Gelding of his out to hire to J. S. he the Defendant did undertake the said J. S. would re-deliver him to the Plaintiff; that accordingly he did let him out his Gelding, but that J. S. did never re-deliver him. At the Trial it appeared upon Evidence, that the said J. S. came to the Plaintiff to hire a Horse from him, who mistrusting was unwilling to let him have his Horse; whereupon the Defendant

came



came, and desired him to let him have it, and that he would undertake J. S. would re-deliver him safe.

And Holt C. J. doubting whether this Promise was not void by the Statute of Frauds and Perjuries, it being not reduced into Writing, directed a Verdict for the Plaintiff, but saved them the Matter to be taken Advantage of above.

See the Argument of Counsel in the Book at large.

Per Holt C. J. and Powell J. There is no such Thing as a Contract or Promise in Law, though there be such Expression in some Books.

But at another Day they declared, That upon Conference with the other Judges, they had great Debate, and great Variety of Opinions in this Case; and that many thought it out of the Statute, for this Reason, That the Horse was let out wholly upon the Credit of the Defendant, that it should be re-delivered; but we (says he) of this Court are unanimously agreed, that it is within the Statute; for it is an Undertaking for the Añ, and to make good the Default of another. And where it has been objected, that if so be the Party did not re-deliver him, the Plaintiff had no Remedy against him upon the Contract, but only in Trover and Conversion upon the subsequent Tort, in case of Demand and Refusal, and therefore they did not bring him within the Meaning of the Statute; for it is a Remedy accruing from a Wrong after the Contract; but there is a Way to charge him upon the original Delivery or Bailment, for the Bailment is such, as in its Nature required a Re-delivery; and if Bailee will not re-deliver the Thing bailed, the proper and only adequate Remedy is an Action of Detinue against the Bailee. Therefore this Promise of the Defendant, that J. S. should re-deliver the Horse bailed, for which there lies a Remedy against the said J. S. upon the Bailment, is a collateral Promise, and therefore a Promise to answer for the Añ and Default of another, and by Consequence within the Statute. So if two come to a Shop, and one of them contracts for Goods, and the Seller does not care for trusting him, whereupon the other says, Let him have them, and I will undertake he shall pay you; that is an Undertaking for the Añ and Default of another, and within the Añ. But if the Promise be, I will see you paid, or I will be your Paymaster, it is otherwise.

Et per tot' Cur' Verdict set aside.

## P R O P E R T Y.

Sutton *versus* Moody. Mich. 9 W. 3.

3 Salk. 290.  
5 Mod. 375.

**T**HE Plaintiff declared in Trespass for breaking his Close, and killing, taking and carrying away certain Conies; Verdict was for the Plaintiff: And it was moved in Arrest of Judgment, that he could not have Property in Conies, which are *Feræ Naturæ*, unless on a special Account, as if he have a Warren.

7 Rep. 17.  
1 Cro. 553.  
Jones 440.  
1 Vent. 122.

Holt C. J. A Man hath absolute Property in *Feris natura sua mansuetis*; he hath a qualified Property in *Feris mansuetis*; and a possessory Property in *Feris*: Now whoever has this possessory Property, which is also a Property *ratione privilegii*, there he may declare for the Thing killed or taken, without saying that it was suum; for he had Property therein, by Reason of his Close in which it was, and may recover Damages, which he cannot do, except the Thing were his. Then as to Hunting, if a Man finds a Hare in his own Land, and kills it on the Land of another, it is the Property of the Hunter, and not of the Person on whose Ground it was killed: So when he starts a Hare on another Man's Land, and hunts it into the Land of a third Person, where he kills it, the Property is still in the Hunter; but if he starts a Hare in my Close, and kills her there, it is mine; and where started in a Forest, and hunted and killed in another Person's Land, the Property is in the Owner of the Forest.

## Quantum Meruit.

Snow *versus* Firebrass. Mich. 12 W. 3.

**I**N Case, Plaintiff declared, That the Defendant, in <sup>2 Salk. 557.</sup> Consideration the Plaintiff had found him sufficient Meat, Drink, Washing and Lodging, for divers Months last past, promised to pay him as much as he deserved; and averred that he deserved so much.

Holt C. J. It is here objected, That the Plaintiff's Declaration is short and uncertain, as to the Time and Number of Months; but the Incertainty in the Length of <sup>1 Show. 342.</sup> Time, or Number of the Months, can do no more Harm than Incertainty as to the Things; which has often been adjudged not to hurt a Declaration: And it is enough to aver how much he deserved.

Judgment for the Plaintiff.

## Quare Impedit.

The Bishop of Exeter *versus* Heal. Hill.  
5 W. & M.

**E**RROR of Judgment in Quare Impedit in C. B. <sup>Com. 239; &c. Parliament Cases.</sup> where the Plaintiff declared, that he was seised of the Manor of South-pool, to which the Advowson of the Church of South-pool in the Diocese of Exeter, being a Benefice with Cure of Souls, was appendant; and being so seised, and the Church being vacant, it belonged to him to present, but the Defendant disturbed, &c.

The Bishop pleads, that he claims nothing but as Ordinary; that Hodder suit minus sufficiens in literatura seu capax ad locum præd. habend. and that the Bishop, upon Examination, found him in literatura insufficientem, & ea ratione inhabil', &c. and gave Notice thereof to the Patron;



who lapsed his Time, and therefore by Lapse the Bishop presented Haman.

The Plaintiff replies, That Hodder was in Orders, and after other frivolous Pleadings, upon a Demurrer it was adjudged in C. B. against the Bishop: Now, upon the General Error assigned, the sole Question is, Whether the Defendant's Plea be good.

The Judgment was affirmed, for that the Plea is uncertain.

## Que Estate.

Stilly *versus* Dally. Pasch. 10 W. 3.

2 Salk. 562.  
Co. Lit. 303.

3 Lev. 19.  
1 Lev. 190.

1 Salk. 363.  
1 Mod. 231.

5 Mod. 150.  
2 Salk. 629.

1 Sid. 298.  
2 Sid. 10.

2 Mod. 143,  
144.

2 Show. Caf.  
426.

Lutw. 80, 81.  
5 Mod. 206.

3 Mod. 48.  
Cro. Jac. 418.

2 Vent. 182.  
3 Lev. 193.

Raym. 389.  
2 Keb. 87, 96.

1 Sid. 279.  
Show. 64.

3 Lev. 133.

**I**N Replevin, the Defendant avowed, and set forth that J. S. was possessed of a Messuage and forty Acres of Land, setting out the Time of the Commencement of the Lease, and demised, rendering Rent, &c. And that he, being possessed of the Reversion, died, and it came to his Executor, and for Rent arrear he avow'd. The Plaintiff demurred, and shew'd for Cause, that the Avowant had not shewn who was Lessor of J. S. and for this it was held naught.

Per Holt C. J. The Reason why the Commencement of particular Estates must be shew'd in Pleading, is because they are created by Agreement out of the primitive Estate, and the Court must judge whether the Primitive and Agreement be sufficient to produce the particular Estate claimed.

## Qui tam, & Tam quam.

3 Salk. 7.

Holt C. J.

**R**uled, that where a certain Penalty is given by Statute to the Party grieved, he need not join the King in an Action Qui tam pro Domino Rege, &c. for 'tis like a private Act only for his Benefit: But it

lies for Scandalum Magnatum; for the King is prejudiced by that, which is the Ground of the Action; and it lieth against the Sheriff if one taken upon a Capias Utlagat. escape, or against the Rescuer, if he be rescued; tho' the Plaintiff is not bound to bring it in Qui tam, &c. but may have Debt alone in his own Name. And 'tis to be observed, that altho' the Action is in the Tam quam, i. e. tam pro Domino Rege, quam pro seipso, yet the Party shall have all the Damages; but in some Cases, as upon the Statute of Hue and Cry, and for not appearing as a Witness, being served with a Subpoena, a Man may bring either Debt or Case; if he brings Debt, he must sue without the King, for the Debt is due only to the Party grieved; if he bring Action on the Case, he is to sue in the Tam quam, because the Action being founded on the Tort, that is to the King as well as the Party.

It has been held, the King hath no Privilege in Action Qui tam; and that the Prosecutor may be nonsuited therein, &c.

Roll. Abr. 1.  
1 Roll. Rep.  
78.  
2 Cro. 361.  
Bridgm. 8.  
Rast. Ent.  
193.

## RECOGNIZANCE.

Hammond *versus* Wood. Trin. 3 W. & M.

**T**HE Conussee of a Statute had Lands extended, and delivered to him upon a Liberate. The Conusor being in Possession continued his Possession; afterwards the extended Interest was assigned; and the Question was, whether it was assignable? The Court held not.

(1.)  
2 Salk. 563.

Vide Cro.  
Car. 141, 149.

Holt C. J. By Return of the Extent, an Interest vested in the Conussee; the End of the Liberate is to have an actual Possession of the Interest; and it must be taken that he has by the Return of the Liberate; the Sheriff returning thereupon Liberari feci, the Conussee is estopped to say otherwise. If the Conusor keeps Possession after this Return, the Conussee's Estate is turned to a Right. Vide 1 Inst. 156. Lit. 129. And this is not like the Case of a Mortgagor, who continues in by Consent of the Mortgagor.

Vide Farell.  
38, 97.  
Cro. Jac. 3,  
12, 449.  
1 Show. 281.  
3 Lev. 312.  
1 Vent. 42  
4 Mod. 48

The Queen *versus* Ewer. Pasch. 1 Ann.

( 2. )  
Farrell. 9. 10.  
2 Salk. 464.

A Scire facias issued upon a Recognizance entered into, with Condition that one J. S. should appear to an Indictment against him removed by Certiorari, and carry it down to Trial according to the late Act of Parliament; and the Defendant demurred to it, for that the Writ varied from the Recognizance, and that was in a greater Sum than the Statute required.

5 & 6 W. &  
M. c. 11.

Holt C. J. The Recognizance varies from the Statute, and therefore cannot be good by the Statute; tho' it may be good at Common Law: It is true, the Recognizance, if not according to the Statute, cannot make the Certiorari a Superfedas, which may not be without a Recognizance of 20l. &c. But before this Act, the Judges of this Court had Power to take Recognizances, which is not taken away by the Statute; only they shall not be such as will make a Certiorari a Superfedas.

The Writ was quash'd.

Cherly *versus* Wood. Mich. 2 Ann.

( 3. )  
Mod. Cases  
42, 43.

I N Debt on Recognizance, the Plaintiff declared, setting forth a Recognizance acknowledged in the Court of C. B. before Sir G. T. & Sociis suis: And upon Nul tiel Record pleaded, the Record was produced, being a Recognizance taken before Mr. Justice Nevil at his Chambers in Serjeants-Inn, and by him brought and delivered into Court.

1 Cro. 312.  
Hob. 195, 196.  
Alleyne 12.

Holt C. J. As to the Usage of declaring this Way on Recognizances, it is against Law; and the Plaintiff hath failed of his Record, for the Record is such as 'tis entered upon the Roll, and in Pleading must be so described: In this Court, we enter all Recognizances as taken in Court, and never mention a Day certain; but in the Common Pleas, they make a Special Entry of the Recognizances taken at a Judge's Chamber, on a Day certain, so that there they bind Lands from the Caption; and in B. R. from the Time of Entry: Also upon their Recognizances a Scire facias lies in either County, of London or Middlesex; but on ours in the County of Middlesex only; therefore these are different in Substance.



Per Cur': If the Party, that removes an Indictment by Writ of Certiorari, do not enter into a Recognizance to try it the next Assize or Term, or the Sittings within the Term; the Certiorari is no Superledeas: And Failing of Trying is a Forfeiture of Recognizance, after which they will not hear a Motion in Arrest of Judgment.

R E C O R D S.

Waites *versus* Briggs. Mich. 6 W. & M.

( 1. )

2 Salk. 565.  
2 Saund. 254,  
393.  
6 Mod. 18,  
245, 257.  
S. C. 5 Mod.  
8, 9.  
1 Sid. 429.  
6 Mod. 103.  
Lutw. 332.  
2 Salk. 298.

**I**N Debt for an Escape, the Plaintiff declared the Prisoner was committed and escaped; and because he did not say, prout patet per Recordum, the Defendant demurred generally, but the Plaintiff had Judgment; for the Gift of the Action was the Escape, and the Commitment only Inducement.

The King *versus* North. Hill. 8 W. 3.

Holt C. J. **I**T is an Error in the Clerks in London, upon a Certiorari, to return only a Transcript, as if the Record remained below; for in C. B. tho' they do not return the very individual Record, yet the Transcript is returned as the Record; and so it is, in Judgment of Law.

( 2. )

2 Salk. 565.  
6 Mod. 188.

Anonymus. Trin. 11 W. 3.

**I**N an Action against H. Defendant pleaded the Composition Aa; the Plaintiff replied Nul tiel Record. Upon the Day given to bring in the Record, the Defendant brought in the printed Aa.

( 3. )

2 Salk. 566.

Holt C. J. An Aa printed by the King's Printers is always allowed good Evidence of the Aa to a Jury, but was never allowed to be a Record yet. Set an Exemplification, plead it exemplified, and then no Man can deny it.

3 Lev. 243.

Clapham *versus* Wray. Mich. 12 W. 3.

(4.)  
Cafes W. 3.  
423.

Holt C. J. **W**hen a Prisoner renders himself in Discharge of Bail in a Judge's Chamber, the Course is to have an Entry of it in a Piece of Parchment, signed by the Judges, which is sent over with the Prisoner to the Marshal, and ought to be brought back and filed in the Office, and is in Truth the Record; and the Entry in the Judge's Book is not very material.

## RECOVERIES.

Earl of Pembroke's Case. Pasch. 2 W. & M.

(1.)  
Carthew 111,  
112.  
Skin. 273.

**O**n a Writ of Error to reverse a Recovery, a Scire facias was sued out against the nominal Demandant in the Writ of Entry, &c. upon which this Recovery was suffered; who was returned summoned, and the Plaintiff assigned Errors, &c. and then it was moved, that the Plaintiff might be compelled to sue out a Scire facias against the Certenants, as well as against the Demandant; for they ought not to be put out of Possession, without any Warning to defend themselves, and they may have a Release, &c. to plead.

Sid. 213.  
Raym. 16.  
1 Lev. 146.  
Dyer 321.  
Co. Ent. 233.

Holt C. J. The granting a Scire facias in these Cases against the Certenants is discretionary in the Court, and not *stricti juris*; but yet it hath been the constant Course of this Court to grant it: And tho' this was a very extraordinary Case, a Scire facias was awarded against the Certenants, in Order to the Reversal of the Recovery; and 'tis the like Law in Error to reverse a Fine.

Lacey *versus* Williams. Trin. 11 W. 3.

(2.)  
2 Salk. 568,  
569.  
Carthew 472.

**E**rror of a Judgment in Ejectment in C. B. wherein a Special Verdict was found, that a Writ of Entry was brought against Miles Corbet, upon the Return of which

which he appeared, and the Demandant counted against him; that he vouched Lacey the Tenant in Tail, and a Summons ad warrantizandum issued; but after the Teste, and before the Return of that Writ, Lacey conveyed to Corbet by Lease and Release for Life; and at the Return of the Summons, Lacey Tenant in Tail appeared and entered into the Warrant, and vouched over the common Vouchee, and so a common Recovery was had. This Recovery being held good in the Court of C. B. It was here insisted in Error, that Miles Corbet was not Tenant to the Præcipe at the Time of the Writ of Entry; and therefore 'twas ill.

Holt C. J. If the Tenant to the Præcipe gains a Freehold before Judgment, it is sufficient, for it cannot be said to be a Recovery against him that had nothing; here a Writ may be made good by a subsequent Purchase, and so may a Voucher; and 'tis not enough in a Counterplea of Voucher or Non-tenure, to say, he had nothing in the Lands at the Time, without adding nec unquam postea: And this is the more reasonable, because the Demandant may have good Cause of Action, tho' the Tenant have not the Land; for 'tis not his being Tenant to the Præcipe, but the Demandant's having a Right to the Lands, that is the Foundation and Cause of Action; and therefore 'tis sufficient in Law, if the Tenant have the Land to render at any Time before Judgment. And the Chief Justice said, that a Reversion expectant is barred by a Common Recovery; and yet the Recompence cannot extend to that, which he said was a bold Advance in Favour of Common Recoveries.

The Judgment was affirmed.

Machil *versus* Clerk. Trin. 1 Ann.

THE Case upon a Writ of Error, on a Judgment given in the Common Pleas, appeared to be this; Tenant in Tail in Consideration of a Marriage of his Son, Covenantants to stand seised of Lands to the Use of himself for Life, Remainder to John his Son, and the Heirs Male of his Body by his intended Wife, with several Remainders over; and after he suffers a Recovery, in which he himself is Tenant to the Præcipe, and vouches over the Common Vouchee, which Recovery was to other Uses than those mentioned by the Covenant: Whereupon the Question

( 3. )  
Farrell. 18,  
21, 23, 25,  
26, 27.

was,



was, Whether the Tenant in Tail, notwithstanding the Covenant to stand seised, continued seised in Tail, for then the Recovery was good; otherwise it could not be good in this Case, he coming in as Tenant to the Præcipe? And it was objected, That the Estate-tail was altered by the Covenant to stand seised, and so the Recovery void in Law.

Holt C. J. It is the Opinion of this Court, that if Tenant in Tail by Covenant to stand seised, or by Lease and Release, or Bargain and Sale, conveys to another and his Heirs, he has a base Fee, not determined by the Death of Tenant in Tail, but continuing in the Covenantee or Releasee, &c. 'till the Issue in Tail make an actual Entry: For before the Statute de Donis the Tenant in Tail had an Estate of Inheritance in him, which was called a conditional Fee-simple; and that Statute does not alter the Nature of the Estate, so as to make it not an Inheritance, but only fires it that there shall be no Alienation to disinherit the Issue in Tail; yet so as a base Fee may be made of it, for which see the first Institute: And therefore, as he might before the Statute, so he may do since; for the Statute only makes it voidable. The Tenant in Tail has the whole Estate, and why should not he by Bargain and Sale, Lease and Release, or Covenant to stand seised, be able to divest himself of the Whole, and put it in the Bargainee? For the Power of Disposing is an Incident inseparable to his Estate; and so is Seymour's Case in Point, where Tenant in Tail bargained and sold to another and his Heirs, it was held that the Bargainee had a descendible Estate: 'Tis true, that a Bargain and Sale by a Tenant in Tail, to one and his Heirs, does not work a Discontinuance; but the Estate passing by it doth not determine 'till Entry of the Issue. And where Littleton says, he cannot dispose of more than for his Life, that is, he cannot do it to bar his Issue; but he may convey the Estate that it shall continue longer, if his Issue will not avoid it: And the Case of Fines in Coke's Third Report says, that if Tenant in Tail be of a Rent or Advowson, and he grants the same to one and his Heirs, tho' he dies, the Rent or Estate in the Advowson is not thereby determined, but at the Election of the Issue in Tail; and if the Alienation be with Warranty, and the Issue bring Formedon, and then the Alienee pleads a Warranty with Assets in Bar, he shall be barred by Reason thereof; so that 'till it be done by the Issue in Tail to determine it, the Alienation continues. And this is no great

- 1 Inst. 18.
- 10 Rep. 95.
- 3 Rep. 84.
- Litt. Sect. 612.
- 3 Lev. 306.
- 2 Lev. 75.
- 213, 225.
- 1 Vent. 372.
- 1 Mod. 98,
- 121, 159.
- 2 Mod. 207.

great Question; if you consider the common Case of a Lease for Years made by Tenant in Tail, not warranted by the Statute of 32 Hen. 8. such Lease is not void by the Death of Tenant in Tail, the Issue must enter to avoid it; and if he does not, but accepts the Rent, he is bound by the Lease, which shews it was not determined by the Tenant in Tail's Death; for if it were, no subsequent Acceptance of the Rent would help it: Another Instance comes home to the Case in Question, and that is the Case of an Exchange; the Estates given must be equal, as an Estate for Life for another Estate for Life, an Estate in Fee for an Estate in Fee, that is, each Party taking must take an Estate of equal Extent; yet if Tenant in Tail and Tenant in Fee make an Exchange, they both have Fee-simple, and that without Livery; for this is notwithstanding a good Exchange, and a Fee-simple passes from the Tenant in Tail, and shall continue 'till avoided by the Issue, and here he is not put to his Action to avoid it; then the Exchange must have this Effect; that it passes a base Fee, until so avoided by his Issue, otherwise it could not be good: Therefore where Tenant in Tail bargains and sells, leases and releases, or covenants to stand seised to Uses in Fee, such Conveyance shall pass a base Fee; which shall continue till determined by the Issue in Tail; and the Estate-tail in this Case is not in Abeyance, but in the Alienees, for the Law puts nothing in Abeyance but of Necessity. But notwithstanding all these Cases; which shew that Tenant in Tail may make a Conveyance of the Estate in his Life, that shall be good and binding of the Estate-tail, 'till it is avoided by the Issue; yet any Conveyance he makes to commence after his Death, shall be void, if by Possibility it may not take Effect during his Life: And the Estate by this Covenant here, is to begin from and after the Death of the Tenant in Tail. As for what concerns the Case in Question, I shall make this Difference: If Tenant in Tail makes a future Lease for Years, which may possibly commence during the Life of Tenant in Tail, it is not void, but voidable as to the Issue: But if it be a Lease to commence after the Death of Tenant in Tail, 'tis merely void, by the very Creation of it; for it is not to commence 'till the Title of the Issue in Tail commences, and that is an elder Title concurring with it. So in Covenant, if one covenants to stand seised to the Use of A. and his Heirs, or to the Use of A. for Life, Remainder to B. in Fee, the Covenant is not void, but puts the Estate-

1 Inst. 51,  
332.  
1 Leon. 110.  
1 And. 191.  
3 Cro. 895.  
Yelv. 51.  
Hob. 319,  
339.

Dyer 279.  
2 Cro. 565.  
Moor 883.  
1 Rep. 52.

tail out of the Covenantor: Though if Tenant in Tail covenants to stand seised to the Use of A. and his Heirs after his Death, 'tis void. And so it is in this Case; Tenant in Tail covenants to stand seised to the Use of himself for Life, Remainder to J. S. and his Heirs; for the Remainder is to take Effect after his Death, when by his Death the Title of the Issue will commence, which is paramount the Conveyance, i. e. per formam Doni: And the Covenant as to the Estate for Life to himself is void in this Case, because here is no Transmutation of Possession; such Covenant is in no Case good only in Respect of the Remainders; and since the Remainders are void, the Covenant and the first Estate are likewise void. If one Covenants to stand seised to his own Use in Tail, it will be good; and Tenant in Tail has an Estate out of which he may carve other Estates, provided he doth it out of the Estate in himself, so as to make it rightful in its Creation: But to make such Estate take Effect upon the Possession of the Issue, whose Title is paramount, would be to make an Estate take by Wrong the very Minute it has its Creation. Therefore for these Reasons I hold, that the present Conveyance has made no Alteration in the Estate-tail; but the Recovery by Tenant in Tail is well suffered.

The Court affirmed the Judgment.

Page *versus* Hayward. Trin. 3 Ann.

(4.)  
2 Salk. 570,  
571.

**I**N this Case of a Recovery had of Lands devised in Tail by Will, the Devisees and several others Strangers were all vouched jointly, and they vouched over the common Vouchee: To which divers Objections were made.

By Holt C. J. As Common Recoveries are of great Use in the Law, 'tis necessary to speak particularly of them: And here, if the Tenant to the Præcipe vouches Tenant in Tail in Possession, and him in Remainder jointly, and they jointly vouch over the common Vouchee, this is good; not but that it would be more regular, to vouch severally, that the Recovery in Value may not be joint, but enure severally; yet the other Way is good. To explain this, if an adversary Action is brought against several, and one hath the Tenancy of the Land, it is well enough; and if he would plead that he is sole Tenant, and traverse that the others have any Thing, the Demandant may admit that, and proceed as to him, and the Writ shall abate only

3 Rep. 60.  
1 And. 271.  
20 E. 3. 10.  
2 E. 3. 8.  
10 H. 6. 14.  
Raft. 276.



for the Rest; also the others may disclaim: And as Joining a Stranger with a Tenant does no hurt; so such a Joining with a Voucher doth not; for he is but in loco Tenentis, a Tenant by the Warranty. A Tenant in Tail makes a Tenant to the Precipe, and he vouches a Stranger, and the Stranger vouches Tenant in Tail, and he the common Voucher, that is good; for his being a Stranger is not material, because in Judgment of Law he is become Tenant by the Voucher to the Precipe, and a Release to him will be good, also the Voucher, tho' there be no real Warranty, the Recovery in Value being the same, but the Admittance of Tenant in Tail has made it real. At Common Law, if a Stranger was vouched, the Demandant could not counterplead it; but by the Statute of Westm. 1. he may, if he be absent, counterplead the Voucher, viz. That the Voucher and his Ancestors, never had any Thing in the Land; not if he be present: It is enough that Tenant in Tail comes in and owns a Warranty; and in any Action against the Tenant in Tail who has such Warranty, if he makes a Feoffment in Fee, or has levied a Fine with Warranty, and the Feoffee or Conusee vouch the Tenant in Tail, he may make use of his Warranty, and yet he was not seised of the Estate-tail; but in that Case he may dereign the Warranty, and then he recovers in Recompence of his Estate-tail; and when ever Tenant in Tail comes in as Voucher, he is in Privy of all Estates he ever had, and consequently may dereign the Warranty, i. e. prove and recover the same.

1 Vent. 235  
1 Cro. 562.  
Noy 81, 82.  
1 Leon. 283.  
3 Mod. 20.

1 Inst. 385.

See Uses.

R E L E A S E.

Ayliff *versus* Scrimshire. Trin. 1 W. & M.

**A**ction of Debt was brought on a Bond; the Defendant pleads a Letter of Licence to go abroad for seven Years, and Covenant not to sue him, and if the Plaintiff did that he should be discharged and released of the Debt: Upon a Demurrer, it was insisted, that it was only Covenant, and the Word Release here amounts to no more.

(1.)  
1 Show. 46.

Holt

2 Roll. Abr.  
839.  
3 Cro. 352.

Holt C. J. If it had been a Covenant perpetual, that is an absolute Release; but where it is a Covenant not to sue within a particular Time, that is no Release; and you must take your Remedy upon the Covenant.

Judgment for the Plaintiff.

*Cole versus Knight.* Hill. 2 W. & M.

(2.)  
3 Mod. 277,  
279.  
3 Lev. 273.

**U**PON a Scire facias on a Judgment for a considerable Debt, the Defendant and his Wife pleaded a Release from one of the Plaintiffs, who was an Executor, by which he acknowledged to have received of them, as Executors of the Last Will and Testament of J. L. the Sum of 5 l. being a Legacy given to him by L. And then in general Words he released the Defendant of the Legacy, and of all Actions, Suits and Demands, which he had might or could have for any Matter or Thing whatsoever. To this Plea the Plaintiff demurred; and the Question was, Whether the Release was a good Bar or not? It was argued to be no Bar, for it being given upon the Receipt of the Legacy, is tied to that only, and shall not be taken to release any other Thing.

2 Roll. Abr.  
409.  
Cro. Eliz. 6.  
1 Vent. 435.  
2 Lev. 272.

Holt C. J. and Cur: It would be a great Strain, to make general Words which are properly applicable to Things that a Man hath in his own Right, to extend to Things which he hath as Executor: It was never the Intent of the Party to release more than the Legacy of 5 l. and therefore the Words which follow, shall be construed according to such Intention at the Time of making the Release, and be tied up by the foregoing Words, and then nothing will be discharged but the Legacy. Here if this Legacy had not been released by particular Words, it would not have been discharged by a Release of all Actions and Demands whatsoever; therefore 'tis unreasonable, and great Inconvenience would ensue, if these general Words should have a Construction to release any Thing besides this Legacy. The Words in this Case are not of that Extent, as to release Actions as an Executor; for 'tis a Release which goeth to the Right: And in a Case where a Person released all which he had in his own Right, there was a Bond wherein his Name was used in Trust for another; and afterwards he brought an Action of Debt upon the Bond and recovered, tho' the Release was pleaded; for it was held not to discharge that Bond.

Judgment was given for the Plaintiff.

Holt

Holt C. J. If upon a general Release, the Releasee give the Releasee a Bill of Exchange, Note, &c. bearing even Date with the Release, the Release shall not discharge them.

Pasch. 12 W. 3.  
Cases W. 3.  
401.

Topham *versus* Tollier. Trin. 1 Ann.

THE Defendant being an Administrator, in Debt on a Bond, pleaded a Release, whereby the Plaintiff reciting there were divers Controversies between the Defendant and him, about a Legacy and the Right of Administration, releases to the Defendant all his Right, Title, Interest and Demand in the Personal Estate of the Intestate.

(3.)  
2 Salk. 575.

Holt C. J. This is no Plea to the Action; there is a Difference between a Release of all Demands to the Person of the Administrator, and to the Personal Estate, as it is here; for the Bond is not any Right or Demand to the Personal Estate, till Judgment and Execution sued out thereon.

Yelv. 214  
Cro. El. 897.  
Lutw. 249.

Shortridge *versus* Lamplough. Mich. 1 Ann.

IN an Action of Covenant, brought by the Assignee of a Reversion of Land, the Case was this; A. seised of the Reversion of the Lands which were leased to another, did bargain and sell the same to B. for a Year, in Consideration of five Shillings in Hand paid; and after released all his Right, Title and Interest in the Reversion to B. and his Heirs, but did not shew that there was any Consideration for the Release, or any express Uses thereon limited; And therefore it was said by the Defendant, that the Release should have enured to the Use of the Releasee; and by Consequence the Plaintiff hath no Title to the Reversion, nor to this Action.

(4.)  
Farrell. 71,  
73, 75.

The Plaintiff had Judgment in C. B. and now on a Writ of Error, it was urged for the Plaintiff in Error, that if a Man make a Feoffment in Fee to another and his Heirs generally, without any Declaration of Use or Consideration, it shall be to the Use of the Feoffor; so of a Fine or Recovery, and all other Conveyances: In Answer to this it was agreed, that in all Sorts of Conveyances, if there be



Dyer 146.  
2 Roll. 781.  
Cro. Jac. 200.  
1 Inf. 273.

not a Consideration of Use expressed, or necessarily implied, the Use shall remain in the Conveyancer, and draw back the Estate to it. But if there be but a Penny paid by him, to whom the Conveyance is made, it will raise the Use to him, without any Declaration; for there can be no Reason why a Man should give even the least Sum of Money to another, to make a Conveyance of his Estate, with Intent to have it back again to himself: And in a Release to the Lessee in Possession, what passes is by Way of Enlargement of his Estate, &c.

Holt C. J. Though there be no Consideration of Use expressed, yet it does not follow, that it is to the Use of the Feoffor; because that is Matter of Fact extrinsecal to the Deed: If since the Statute of Quia emptores terrarum, 18 Ed. 1. a Feoffment were made by Deed, without Consideration of Use declared in the Deed; the Use might be declared by Parol, 'till the Statute of Frauds and Perjuries, and even since that act, it may be declared by Writing only without Seal. Now for us to construe a Deed to be to the Use of the Relesor, when it may be to the Use of the Relessee, for any Thing that appears, would be very odd; therefore we shall intend it to be to the Use of the Relessee, if no more appear, and if the contrary be not shewn on the other Side by Averment; and the Authority in Coke upon Littleton does not contradict this: Besides, if it be not taken to be to the Use of the Relessee, this Conveyance cannot be of any Use at all; and it cannot be thought, that one would be at the Trouble and Charge of any of these Conveyances, to be seised just in the same Manner as he was before, and of the very same Estate. And Powel J. said, if a Lease be made for twenty Years, and a Release thereupon without Consideration or limiting of any Uses, sure it cannot be intended to be to the Use of the Lessor; for the very extinguishing the Estate of the Lessee is a good Consideration: But the Chief Justice and he both held, that if there were a particular Use limited on the Release, the Rest would result back.

Judgment affirmed.

# REMAINDERS.

Thompson *versus* Leech. Hill. 3 W. & M.

**I**N this Case of a Devise to one for Life, Remainder to his first, second and third Sons, &c. Remainder to another in Tail, Remainder to the right Heirs of the Devisor. (1.)  
 3 Salk. 309.  
 3 Lev. 284.  
 2 Salk. 576,  
 577.

Holt C. J. held, that where there is a Tenant for Life, with a contingent Remainder, and such Tenant makes a Feoffment in Fee upon Condition; if the Contingency happens before the Condition is broken, the Remainder is for ever destroyed, because there must be a particular Estate in Being, or a present Right of Entry when it happens: But in Case the Tenant for Life enters for Breach of the Condition before the Contingency happens, then the contingent Remainder is revived and may vest. And where there is Tenant for Life, with a contingent Remainder to J. S. and then the Tenant for Life is disseised, and after that a Descent and five Years is past; now in this Case the contingent Remainder is gone, for there is nothing left to support it, the Right of Entry being turned into a Right of Action. Tho' before the Descent, Right of Entry was sufficient.

1 Ven. 306.  
 1 Roll. Rep.  
 177.  
 2 Saund. 582.  
 2 Vent. 158.  
 3 Keb. 177.

By Holt C. J. If a Lease be made to A. for Life, Remainder to the right Heirs of B. this is a good Remainder if B. dies before A. because of the particular Estate to support it: But if A. dies in the Life of B. the Remainder is void, for there is no Person to take it, and no particular Estate for supporting the Remainder.

Pasch. 5 W.  
 & M.  
 Skinn. 352.

Andrews *versus* Stroud. Trin. 5 Ann.

**E**Testament for the Manor of Bradfort in the County of Somerset; on the Demise of Sir Francis Windham; on a Special Verdict the Case was, A. was seised in Fee, among other Lands, of the Lands in Question, and being so seised did, by Lease and Release, convey the same in

(2.)

A Term created on a Condition precedent, which never did happen, was adjudged to

arise by the House of Lords, it being made to raise Portions for younger Children.

the

the Year 1683. to Colonel Stroud and his Heirs, to the Use of himself and his Wife R. for Life, Remainder to the first, 2d, 3d, 4th, 5th, &c. Sons in Tail; and for Default of such Issue, and in Case the said A. should die, or be dead without Issue Male of his Body of the said R. to be born, or in Ventre sa mere at the Time of his Death, and shall leave one or more Daughters of his Body, on the Body of the said R. begotten, or in Ventre sa mere at the Time; then to the Use and Behoof of the said Colonel Stroud, and his Executors, for 500 Years, to raise Portions for his said Daughters. They find that there was a Remainder limited to the Administrator of the Lessor of the Plaintiff, and that A. had Issue two Sons, B. and C. and that B. died in the Life of his Father without Issue, then the Father died, then C. died without Issue, then R. the Feme dies; Sir Francis Windham enters, and demises to the Plaintiff, on whom the Defendant enters as Executor to Colonel Stroud; & si, &c. Now the sole Question was, Whether this Term should now begin; and the Court seem'd pretty clear, that this Term was to begin upon Condition precedent, viz. upon the Death of A. without Issue Male living, or in Ventre sa mere on the Body of the Wife at the Time of his Death; and that in as much as A. had a Son at the Time of his Death, the Term could not then commence; and the Words do very clearly shew, that there was a Contingency that was to happen; otherwise that Term could never commence; and tho' there is a great Deal of Equity for the Daughters to recover their Portions, yet these Words are so clear and express, that there is no Room for a Construction in their Favour; but however, if they on the other Side have a Mind to argue it again, we will not deny to hear them, but we shall hardly delay giving our Judgment this Term, that the Plaintiff may have Possession: The Case of Goodier and Clerk, 1 Lev. 23. was cited; and

Holt C. J. said, that Case is ill reported there, and that the Case is thus in his Notes: There was a Lease for 500 Years made, for raising of Portions for Daughters, to begin after the Death of Baron and Feme without Issue Male; and then by another Deed an Estate in special Tail Male was given to Baron and Feme, and both these separate Deeds were made by the same Person; and there were two Principal Questions: First, Whether this Term be good in Point of Creation; and the Court held it good, and particularly Windham and Twissden; which I cannot agree



agree unto: The second Question was, Whether the same was barred by a Recovery suffered by the Tenants in Tail; and resolved unanimously, that it was not, being created by another Deed precedent to the Entail, and not expectant upon it; it was also agreed, as Levinz has it, if the Issue die without Issue, the Term should begin; but these Words are not there restrained to any Time, as they are in this Case.

Powell J. agrees the Case of Goodier and Clerk, which he remembers well, because 'twas remarkable, that a Tenant in Tail could not bar Estates which were to begin after the Intail ended, which was thought very mischievous; for by that Means a Tenant in Tail might deceive a Purchaser, which I should doubt of; but I should take the Lease there to be good in Point of Creation; and so the Court there held it.

M<sup>r</sup>. Eyre held, That this Remainder, whereby the Lessor of the Plaintiff claimed, was also contingent, because it did depend upon the Term for Years, which was contingent; but the Court contra; for 'tis no more than if I make a Lease for Life to B. Remainder for Years in Contingency, Remainder over; Tenant for Life dies before the Contingency happens, surely the Remainder over shall take, 'tis a Thing done every Day in all Settlements; so they would not suffer that Point to be argued, and held the other Point to be pretty clear, which was spoke unto the last Time they gave Judgment; for the Plaintiff recover'd on the first Point in Domo procerum, Mercurii, 5 Feb. 1706.

Remittitur. Vide Abatement.

## RENT - CHARGE.

Hannam *versus* Redman. Mich. 9 W. 3.

**W**here Lands are charged with a Rent-charge, <sup>3 Salk. 109.</sup> and the Owner makes a Lease thereof, by which he covenants with the Lessee to save him harmless, &c. If afterwards the Lessee pays the Rent to the Grantor of the Rent-charge, voluntarily and

and without Compulsion, such Payment is in his own Wrong, and he must pay it again to the Lessor: But in Case the Lessee is distrained for the Rent-charge, and his Goods are thereupon taken, this is a Breach of the Covenant entered into by the Lessor, and 'tis not before; and here the Lessee must shew how he was compelled to pay the Rent, not alledge generally his being obliged to do it. Per Holt C. J.

## R E P L E V I N.

Moor *versus* Watts. Mich. 12 W. 3.

(1.)  
2 Salk. 581,  
583.

**T**HE Defendant being in Custody by Virtue of a Capias in Withernam, upon a Homine Replegiando, wherein an Inquisition by the Sheriff found the Party was eloigned, &c. He brought an Habeas Corpus, and moved to be bailed.

Reg. 79.  
Keil. 71.  
F. N. B. 74.  
2 Show. 218.

Holt C. J. A Homine Replegiando does not differ from a common Replevin de Averii; and in Replevin, after an Elongata and Withernam, if the Defendant pleads Non cepit, he shall have his Cattle again, and even a Capias in Withernam against the Plaintiff for them: So it is if the Defendant claims a Property; for since the Taking of Property is in Question, the Law deems it reasonable that the Defendant should have his Goods again during the Dispute: And by the same Reason in a Homine Replegiando the Defendant, upon Pleading Non Cepit, shall be restored to his Liberty; and the Withernam is no Execution, for that cannot be before Judgment.

It was resolved in this Case, that in a Replevin the Original gives no Day, for that is Viconteil; and so is the Alias, but the Pluries is returnable here; and tho' there be no Summons nor Attachment in the Writ, yet the Day of the Return is a Day to the Parties to appear, and the Entry is, that the Defendant attachatus est ad respondend. de placito quare cepit, &c. And virtually and in Consequence of Law it is so, altho' in Truth there was not actually an Attachment, he being bound to appear upon the Peril of

Withernam: And tho' the Plaintiff be absent, he may make an Attorney, &c.

Cross *versus* Billson. Hill. 2 Ann.

**I**N Replevin for taking the Plaintiff's Mare in a certain Place, called the King's Highway; the Defendant acknowledges the Taking Damage-lesant, in a certain Place called the Queen's Highway, as Bailiff to the Lord L. whose Freehold the Place where is, and traverses that he took the said Mare in the Place called, &c.

Holt C. J. The Defendant is both Actor and Defendant in a Replevin; as Defendant, he may abate the Plaintiff's Writ, and that would be vain for him to do, if he could not have a Return, therefore he must proceed from his Plea in Abatement to make Conusance; for his Action being a Claim of Right to distrain, he ought to make Title to it against the Plaintiff in Replevin, who claims Property in the Distress: Yet this Rule should be explained, viz. If the Defendant in the Replevin claim Property in himself, then he shall have Return without Conusance, because his Plea destroys the Plaintiff's Title: And if he lays Property in a Stranger, and make no Conusance, if that Matter be admitted by the Plaintiff, there shall be a Return without any Conusance, for in that Case, by the Admission, the Plaintiff's Property is destroyed: But in all Pleas that do not shew the Property out of the Plaintiff, a Conusance must be made, and the Plea is what only is answerable, and not the Conusance; for to traverse that would be a Discontinuance. And here, if the Defendant in Replevin will take Advantage of a Variance in the Place where the Taking is laid, from that in which really it was, he must plead it in Abatement; and begin either Petit Judicium de Brevi, vel de Narr', because he says the Cattle were taken in such a Place; absque hoc, that they were taken in the Place in the Declaration: Then he comes, Et pro Return. habendo distinctly says, he avows the Taking in the Place mentioned in the Inducement of his Traverse, Damage-lesant, or for Rent, &c. To which no Answer should be given, but all is to depend on the Plea in Abatement; and it is a proper Conclusion in Replevin to say, Unde petit judicium & Return. Averior: without saying any Thing of Damages, for they are given by the Statute.

(2.)  
Mod. Cases  
102, 103.

1 Roll. Abr.  
781.  
2 Lev. 92.  
1 Vent. 127.  
3 Cro. 896.  
2 Cro. 519.  
1 Cro. 372.  
3 Mod. 248.

1 Lev. 235.  
1 Vent. 40.  
1 Sid. 380.  
Raym. 170.  
17 Car. 2. c. 7.



## R E S C U E.

Wilson *versus* Gary. Trin. 3 Ann.

( 1. )  
Mod. Cases  
211.

**I**N Case against the Defendant for a Rescous on mesne Process; it appeared by the Evidence, that the Bailiff stood at the Street-Door, and sent his Follower up three Pair of Stairs in a disguised Habit, with the Warrant, who laid Hands on the Prisoner, and told him that he arrested him; but the Prisoner, with the Assistance of some Women, got from the Follower, and ran down to the first Floor; and the Defendant who was below in his Shop hearing a Noise, ran up before the Bailiff, and put the Prisoner into a Room, then locked the Door and would not suffer the Bailiff to enter therein.

1 Lev. 214.  
Dyer 69.  
Moor 422.  
Cro. Jac. 345.  
Yelv. 51.

Holt C. J. I Doubt whether this was a good Arrest, it being by the Bailiff's Servant or Follower, and not in the Presence of the Bailiff himself; but however, the Plaintiff must prove his original Cause of Action; and then the Writ and Warrant, by producing sworn Copies of them, examined to be true; and he must shew the Manner of the Arrest, that it may appear to be legal; for otherwise there can be no Rescous; and in Point of Damages, he must also prove the Loss of his Debt, that the Prisoner became Insolvent, or could not be had: And he said, in Case of Rescous you shall have no Favour, because guilty of a Violence against the Process of the Law; so that 'tis not like the Case of a negligent Escape. The Chief Justice charged the Jury generally, who found for the Plaintiff; but he ordered the Postea to be stayed 'till he marked it.

Anonymus. Hill. 3 Ann.

( 2. )  
2 Salk. 586.  
Mod. Cases  
141.

**U**PON Affidavit of a Rescue, an Attachment was prayed against the Rescuers; and this was upon mean Process, but denied.

Holt C. J. The Rescue must be returned upon the Writ, and the Motion and Attachment founded on that; but it is never the Course to grant it in this Case upon Affidavits. Indeed on a Writ of Execution, the Sheriff cannot re-

turn a Rescue, and therefore the Court can there have no other Ground for an Attachment but an Affidavit, and ought to be contented therewith: But here a Rescue might be returned, which is Matter of Record, and consequently a better Motive should be given to the Court.

3 Lev. 46.  
1 Cro. 33,  
77.  
2 Cro. 289.  
Dyer 2112.  
3 Bull. 198.

Sir Samuel Astry said, it was the constant Practice upon the Return of a Rescue, to set four Nobles Fine upon each Offender.

See Leaves.

# RESTITUTION.

Anonymus. Pasch. 4 Ann.

**W**here the Plaintiff has Execution, and the Money is levied and paid, and Judgment is afterwards reversed; because it appears on the Record that the Money is paid, the Party shall have Restitution without a Scire facias; but where it was levied, but not paid, there must be a Scire facias, suggesting the Matter of Fact. But where Judgment is set aside after Execution, for Irregularity, there needs no Scire facias for Restitution, but an Attachment upon the Rule for Contempt, if there be not a Restitution. Per Holt C. J.

2 Salk. 588.  
Cro. Jac.  
246, 698.  
Cro. Car.  
328.

## Return of Writs.

Kendall *versus* John. Mich. 5 Ann.

**C**ASE; and declares, that the Plaintiff stood Candidated to be a Member of Parliament for the Borough of B. A Writ was directed to the Mayor and Burgesses of the said Borough, to return two Burgesses to serve in Parliament, and that he falsly and

(1.)  
A Man, that was duly chosen to serve in Parliament, was not returned by

the Sheriff, but another was; and on Petition, the other was adjudged well chose by the Commons, and the Return amended; and yet it was adjudged he could bring no Action, because it appeared on a Record he was returned. Salk. 504.

maliciously did return one A. though the Plaintiff had been duly chosen, to his Damage 100l. And on Not Guilty pleaded, and Verdict for the Plaintiff, it was moved by Fortescue, that this Action did not lie; first, because it was a new Action, of which we never heard. 4 Inst. 17. 1 Inst. Sect. 108. If Offences in Parliament were punishable elsewhere, we should hear thereof before now: This is a Parliamentary Right, and should be a Parliamentary Remedy, as a Common Law Right should have a Common Law Remedy. The Reason of Actions on the Case for false Elections is, that otherwise a Man might lose an Office of Profit without any Remedy, for you could not aver against a Record, and the Record is the Return: But this is no Office of Profit, for Knight of the Shire in old Saxon is no more than Servant of the Shire, and so the Members are in their Institution but Servants of their Representatives; so it is *damnum sine injuria*. Besides, this Action is at the Common Law, whereas it should be brought, if at all, on the Stat. 23 H. 6. cap. 15. so is Hob. 78. Then the Defendant is a Servant of the House of Commons, and this is a Matter that is to be determined there. The House of Commons may send for this Mayor, and may punish him as they think fit, and the House of Commons may and have given Costs in such Case: 9 W. 3. there was such an Action brought, 2 Sid. 168. but it was not adjudged, vide Lutw. 88. Then he said, that no Man shall be twice punished for one Crime, and here this Matter was tried and heard in Parliament; the Plaintiff has his Seat in Parliament, and therefore it shall not now be brought to an Aliud examen, because thereby Jurisdictions may clash, and the Jury and the House of Commons, who have different Process for finding out the Truth, may be of different Opinions; and the Jury are not to be estopped by a Vote of the House of Commons: And I think there is no Remedy, unless you had brought an Action on the Statute of 23 H. 6. cap. 15. And I think, as this Case is, you could have no Action at all, for there is no false Return at all, because the Return was amended by the House of Commons: So that now upon the whole Matter, the Plaintiff was returned *ab initio*.

Eyre for the Plaintiff prayed Judgment; and said, The Statute of H. 6. was absolute, and that 100l. which was then given for a false Return, was more valuable than 500l. is now, and therefore the Remedy, which was then thought sufficient, would now bear no Proportion to the Injury done; this was an Injury and a Damage; for our  
 Prose.



Prosecution in the House of Commons was a Damage, and the House of Commons gives us no Damages. And this is no such new Thing; besides, if it were; the Statute of W. 2. cap. 24. provides new Remedies for new Cases, because new Cases were foreseen. Actions for no Returns are frequent in our Books, and Actions for false Returns are within the same Reason. Then there are Wages due to Members of Parliament, which is an Injury to deprive the Plaintiff of, and also Damage. And if there was no Profit, if a false Return was made of an Alderman; who had no Profit, yet an Action would lie. Then as to your being a Servant to the House of Commons, that makes nothing for you, because the House of Commons may send for any Person they will. The Courts of Law do every Day determine the Privileges of Members of Parliament; so is Moor 75. that Jurisdictions should not clash; for the Resolution of the House of Commons is binding, and shall conclude a good Jury, and it is by that for ever settled. And further he said, though the Statute H. 6. had given a Remedy, yet it does not follow from thence, that there was no Remedy at Law before. Put as to the Objection, that no false Return is made, because the Return is amended, and the Plaintiff is a sitting Member, that makes nothing in this Case, for we declare of a false Return, and there is nothing on this Record against it.

Holt C. J. It is well done of the Sheriff, Mayor, or other Officer, when he has a probable Cause to doubt, to make a double Return, but when he does it maliciously, then it is bad; and in the Case of Soames and Barnardiston, there was no Malice. Suppose a Return was amended, yet whether sufficient Cause did not remain to prove a false Return?

Powell J. We adjudged in C. B. that such Actions did not lie, before the same was determined in Parliament; but we said nothing in Case it was first determined in Parliament. But I do not think a Jury should be bound by the Vote of the Parliament. If an Officer makes a false or double Return, without any probable Cause, an Action will lie.

Holt C. J. If a Man be put to unnecessary Charges and Costs, an Action will lie. Adjournatur.

Kendall *versus* John. Hill. 5 Ann.

(2.) **T**HIS Case was this Day argued by Broderick in Arrest of Judgment: There has been so much said already as to the Action itself, that I will not take up the Time of the Court, but will say something which I think has not been much spoken to, and that is, to shew that no Action could lie at the Common Law in this Case, for the Plaintiff had no Loss, if he had not been returned, and so *damnum sine injuria*; for the Person who is returned to serve in Parliament, if he be honest, can make no Profit of it, for it is only a Service and a Trouble; for he is, as appears by the Writ, to assist the Queen in consulting about the Welfare of the Kingdom, therefore it is plain, he cannot say there is any particular Damage done to him, for he could have no particular Benefit by it; and there is no Man but would, in Presumption of Law, be excused from it; for sitting and attending the House was counted a Burden, and that is the Reason of the Privileges, because they neglect their own for the publick Business; and from thence is the common Word, that such a Man is chosen to serve in Parliament; and by the Statute 5 R. 2. cap. 4. if a Member was summoned to serve in Parliament, and did not come, he was by that Act to be amerced; so that it was reckoned no Profit to any Member, but a Pain; the Case of the Lords Sturton and Mordant, Moor 778. Noy 102. where they were fined in the Star-Chamber for not appearing in Parliament, according to the King's Writ, shews that there was no Profit, only Service and Attendance, in being a Member of either House; vide a Case Noy 104. where a Person was fined for praßling to be unduly elected, but no Action on the Case was brought by the Party grieved, because, as I take it, he suffered no Damage; and the Queen and the Publick have an Interest therein, and suffer thereby, and no Body else, so it is a popular Action. Besides, all the Statutes, viz. 5 R. 3. 5. 6 H. 6. 4. 8 H. 6. 1. made to prevent undue Elections, do not so much as insinuate that the Person, who lost his Election by an undue Return, had any Damage thereby; but the Stat. 23 H. 6. cap. 15. gives to the Person who is duly elected, and not returned, an Action on the Statute, wherein the Sheriff, who shall make such an undue Return, shall forfeit therein 100 l. and the head Officer of a Corporation 40 l. this Action to be brought

within nine Months after the Beginning of the Parliament. This Act seems to look upon the Person duly elected and returned, to be grieved, yet by the Course of the former Acts of Parliament, which I cited before, and also from the Nature of the Thing, we all know very well that he suffers no Damage thereby; so that no Action upon the Case lies at the Common Law for it; the Stat. 7 & 8 W. 3. cap. 25. does give Remedy to the Party grieved, but then the Answer to the other Statute of 23 H. 6. 15. answers this also; for these Acts do not alter the Nature of the Thing, only inflict a greater and another Sort of Punishment for the same Offence.

Mr. King for the Plaintiff: If this Action does not lie at the Common Law, yet I take it, that this shall be intended by the Court to be an Action upon the Statute of H. 6. though we have not concluded contra formam Stat. for whenever no Action lies at the Common Law, but an Action is given by an Act of Parliament, which is a general Law, and of which the Judges are to take Notice ex officio, there if you bring yourself within the Description of the Statute, it shall be taken an Action on the Statute, though you do not conclude contra formam Stat. So when a Cui in vita is brought when the Baron loses the Lands of his Feme, which Remedy is given by the Statute of W. 2. cap. 3. there she needs not conclude contra formam Stat. so is Rast. 139, 157. b. 358. a. So no Formedon in descender lay at Common Law, yet when you bring it now, you need not conclude contra formam Stat. 5 H. 7. 17. b. So if you bring an Action on the Custom of Merchants upon a Bill of Exchange, you need not set forth the Custom, for the Court will take Notice of the Custom in such Case, being a general Law, and now Part of the Common Law. So Debt upon an Escape lay not at the Common Law, but was given by Stat. 1 R. 3. cap. 12. yet I may bring an Action of Debt now for an Escape, though I do not conclude contra formam Stat. so is 1 Sand. 34. 2 Sand. 98. where you have the very Record: So if I bring an Action upon a general Statute, and there mis-recite the Act, and do not conclude contra formam Stat. yet that shall do me no Hurt, because there is a general Law, of which the Court will take Notice, whether I do set forth the same or not; though if I had concluded contra formam Stat. præd', that would be ill; so is 1 Cro. 232, 233. one was indicted upon the Statute of Stabbing, yet need not conclude contra formam Stat. Alleyn 44. and the Case where People were indicted for selling



Ale in black Pots not marked, though he does not conclude contra formam Stat. yet it was held well enough; 1 Ventr. 13. 1 Sid. 409. 2 Keb. 477. And all the Cases are upon the same Reason with the Case in Question; for our Action is founded on a general Law, whereof the Court is to take Notice. We have brought ourselves within the Description of the Law, and I hope the Court will let us have our Judgment.

Holt C. J. When an Act of Parliament gives you an old Remedy in a new Case, there you need not conclude contra formam Stat. as your Case of a Cui in vita is, for a Cui in vita was at the Common Law: So Debt upon an Escape, for an Action of Debt was known at the Common Law: So it is if a new Remedy be given in an old Case, you need not conclude contra formam Stat. and so it was agreed in that Case, 5 H. 7. 17. b. As to foreign Bills of Exchange to Venice or Amsterdam, when you would recover double or treble Ale thereupon, you must set forth the Custom of Merchants, to intitle yourself to that, but otherwise the Course of Trade is well known, and to be encouraged, the Custom need not be set forth; and it was so ruled by Hale. As to your Case of the Indictment on the Statute of Stabbing, you need not alledge contra formam Stat. for the Crime is Homicide at the Common Law, and this only gives a further Punishment. I do not know what to say to your Case of selling Ale in black Pots, but it was penal at Common Law to sell Liquors in Vessels which were not measured; the Judgment was good at the Common Law, which does appoint just Measures.

Powell J. The Difference is good, where no Action lies at the Common Law, and an Action lies by a general Statute; and I do agree the Case to be good Law, as Mr. King has taken the Distinction in 1 Cro. 232, 233.

Holt C. J. the next Day said, If no Action lies at the Common Law, and you may have an Action by a general Statute, then if you bring yourself within the Description of such Statute, you need not conclude contra formam Stat. so it was agreed in the Year 1656, when Roll and Newdigate sat here. But if an Action lies at Law, and also by Statute, though the Statute be general, yet there you must conclude contra formam Stat. if you will take the Benefit of that Statute.

Kendall *versus* John.

Holt C. J. **D**elivered the Opinion of the Court, (3.) that Judgment should be arrested; my Reason is, that the Action does not lie, as this Case is, because the Plaintiff is admitted by the House to be a Member, and the Return he complains of is altered, and his Name is inserted instead of the other; so that to maintain this Action, would be to aver against the Record, which is now set right in Chancery, and every Body is estopped to say he is not elected; to say it is a false Return to one Purpose, and a true Return to another Purpose, would be a Contradiction; so to say that he is a Member to sit in Parliament, and not a Member, to entitle him to this Action. It would have been well if he had brought his Action on the Statute, for there the Clerk's Notes would have been Evidence; and I cannot intend this to be an Action on the Statute, because that is of a different Species from an Action on the Case; for in the latter, a Writ of Error will lie into the Exchequer Chamber, though not in the former. I do agree, you need not in an Action on the Statute conclude *contra formam Stat.* but you must not say *de placito transgr. super casum*; yet you must say, *de placito transgr. & contemptus contra formam Stat.* and bring yourself within the Description of the Statute.

Powell J. and his Brethren grounded their Judgment upon the Case of Barnardiston and Soames. And Powell added, If that Judgment had not been given, he would be for the Plaintiff.

## R I O T S.

Anonymus. Pasch. 1 W. & M.

By Holt C. J.

**A**n Indictment against J. S. for that he, cum multis aliis, at H. in such a County, did commit a Riot, is good: And where a great Number of People are indicted for a Riot, they may move that the

(1.)  
3 Salk. 317.  
Mod. Caf.  
212.

Prose-

Prosecutor should name three or four of them, and try it only against them, the Rest entering into a Rule, if they are found Guilty, to plead Guilty too; and this has been often done to prevent Charges.

The Queen *versus* Pugh & al'. Pasch. 3 Ann.

(2.)  
Mod. Caf.  
140, 141.

**U**PON an Inquisition taken before two Justices of the Peace, against the Defendants for a Riot; several Exceptions were made to the Inquisition, and as to the Offence committed.

Holt C. J. & Cur': If a Number of Persons meet to do an unlawful Act, and after they have so met, they do it not, that is an unlawful Assembly, but not a Riot: Also if they meet to do any Act that in itself is not lawful, but not an Act of Violence or Force, and they do it, it is no Riot, but an unlawful Assembly. But here is an actual Riot committed, and if the Justices neglect to make their Inquisition within a Month, they shall forfeit the Penalty of 100 l. by Statute; but notwithstanding they may enquire after, when they have issued a Precept within the Month for that Purpose: For the Lapse of a Month doth not determine their Authority to make an Inquisition, but only subjects them to a Penalty for not doing it in that Time. And where Rioters are convicted upon View of two Justices, the Sheriff must be a Party to the Inquisition, and the whole Proceedings, by the Statute 13 H. 4. But if they disperse themselves before Conviction, the Sheriff need not be Party; for in such Case the Justices may make the Inquisition without him; and this is *pro Domin. Reg.*

13 H. 4. c. 7.  
8 H. 6. c. 9.  
Hob. 92.  
Raym. 386.  
Skinn. 119.

The Queen *versus* Ellis. 6 Ann.

(3.)  
2 Salk. 595.

**A**N Indictment against four Defendants, for that they did riotously assemble, and *vi & armis* beat and wound one Ellis a Stage-Coachman, &c. It was here insisted upon the Evidence, that this was a Trespass, and not a Riot, because the Company was lawfully assembled.

Holt C. J. Where several are assembled lawfully, without any evil Intent, and an Affray happens, none are guilty but such as act; it is otherwise if the Assembly was originally unlawful, for there the Act of one shall be imputable to all: If three or more are lawfully assembled, and quar-



telling among themselves, all fall upon one of their own Company, this is no Riot; but if it be on a Stranger, the very Moment the Quarrel begins, they are an unlawful Assembly, and their Concurrence is Evidence of an evil Intention, so that it is a Riot in them that act, and in no more.

2 Keb. 558.  
Mod. Caf.  
43.

And so it was ruled, and found by the Jury.

There must be three Persons at the least to make a Riot, and two cannot be guilty of it: And where four were indicted of a Riot and Assault, the Jury found two Defendants guilty, and acquitted the others.

2 Lill. Abr.  
489.

Per Holt C. J. Here the Defendants being discharged of the Riot, are likewise discharged of the Assault; for that is not laid as a Charge of itself, but as Part of the Riot; therefore no Judgment can be given.

2 Salk. 594.

## R O B B E R Y.

Afchcomb *versus* The Hundred of Elthorn. Hill.  
2 W. & M.

**T**HIS was an Action upon the Statute of Hue and Cry, 13 Ed. 1. and the Case appeared to be thus: The Plaintiff having sent his Servant to Smithfield Market with fat Cattle, he sold them for 108 l. and delivered the greatest Part of the Money to a Quaker, who travelled with him towards Home, and they were both robbed within this Hundred of the whole 108 l. And now the Plaintiff, whose Money it was, brought this Action; but the Servant only made Oath of the Robbery, the Quaker refusing: The Question was, whether it was sufficient for the Master to maintain his Action?

(1.)  
Carthew  
245, 146.

It was resolved by Holt C. J. and the Court, That the Master may sue for the Robbery of his Servant, and the Oath of the Servant is sufficient; also that the Servant may sue, for he had the Possession: And if a Servant be robbed in the Presence of his Master, the Master must sue the Hundred, and the Oath of the Master shall suffice; but if the Servant was robbed out of the Master's Presence,

7 Rep. 7.  
2 Saund. 382.  
Style 156.

then the Servant must swear. And here, as to the Quaker that refused to take the Oath, the Hundred is not liable; for the Statute of Eliz. was made in favour of Hundreds, who were oppressed by pretended Robberies, to prevent Combination between Robbers and the Party robbed: Therefore as to that Money, Judgment was given for the Defendants.

2 Roll. Abr.  
681.

1 Leon. 523.

2 Brownl. 10.

Holt C. J. declared, that the Servant in this Case, who delivered the Money to the Quaker, and was present at the Robbery, might well maintain the Action in his own Name for all the Money, and that his own Oath would be sufficient; and he might declare upon the Taking from the Quaker as his Servant, who in Truth was so for the Time; And this Advice was followed in another Action brought against the Hundred. And the Chief Justice mentioned a Case then lately tried before him, of one Bird who was a Laceman, that in coming to London out of Devonshire with his Servant, they left the usual great Road between Brentford and Hammer Smith, and rode through a By-Lane near Serjeant Maynard's House, to avoid the Dust; and there the Servant was robbed, in the Presence of his Master, of a Bor of Lace that was behind him on the Horse's Back, to the Value of 1200l. and the Master alone made Oath of the Robbery, and brought the Action: And it was the Opinion of the Court, that the Oath by the Master was sufficient, because he being present, the Goods were in his Possession; for the Possession of the Servant in the Master's Presence, is the Possession of the Master. Whereupon Bird recovered a Thousand Pounds, and had Execution.

### Cooper *versus* The Hundred of Basingstoke. Hill. 1 Ann.

(2.)  
Farrell. 157,  
159, 160.

**I**N an Action of Debt against the Hundred, on the Statute of Winchester, a Special Verdict found, That the Plaintiff was travelling in the Highway, within the Hundred of M. and thereupon he was there assaulted, and set upon by several Persons to him unknown, who took and carried him into a Coppice near the said Highway, in the Hundred of B. and there did rob him. It was here the Question, if that Hundred was chargeable with the Robbery?

Holt C. J. It has been endeavoured to maintain, that this Robbery was committed in the Hundred of M. but it

is most plain, that it was wholly done in the Hundred of B. For without all Question, if they had been two Counties, as they are two Hundreds, and he had been taken in one County, and carried into the other, and there robbed; the Robbers must have been tried where the Robbery was committed. Now then, if the Robbery be committed within the Hundred of B. by the express Words of the Statute it is chargeable, so as to make Satisfaction for the Robbery. And it is impossible, in this Case, to make the Robbery in the Hundred of B. to be a Robbery from the Time of the Assault; for there is no manner of Reason for a Relation here, as in the Case of Murder, where it is certain it shall relate to the Stroke, which was the Cause: Here is no Robbery committed till the Plaintiff is in the Hundred of B. because there the Taking away is, which is the Fact that makes the Hundred chargeable; and the Assault is not the immediate and efficient Cause of the Robbery, like unto a Stroke in Murder; therefore there is no Relation to it; and if there be no Relation, then of Necessity that Hundred must be liable where the Fact is committed, and that is the Hundred of B.

And the Case in Goldborough allows this to be Law: Some Thieves came upon a Carrier, and seized on him and his Horses, and drove his Horses into another Hundred, and there they rifled his Waggon; and the Hundred where the Rifling was by the Robbers, was held not chargeable, because it was a compleat Robbery, by taking the Carrier and the Horses into their Possession, and the Rifling after does not make it a greater Robbery than it was before: But if the Carrier had been left in Possession of his Waggon and Horses, and only obliged to lead into that Place, and the Goods were there taken from him; there the Place where the Goods had been actually taken, would have been liable. But the true Reason why the Hundred of B. stands here charged, is this; the Hundred is not chargeable because they did not prevent the Robbery, but because they have not taken the Malefactors after; for let the Mischief be ever so great, if they apprehend the Robbers within forty Days, they shall not be charged: Then the Robbery and Charge does not come upon the Hundred, till it be compleated; and in this Cause there was nothing done in the Hundred of M. but the Assault; so that if there be no Obligation on that Hundred to take the Robbers, the Hundred of B. must do it, because it must be done by one or the other. We are all of Opinion, that the Hundred of B. is charge-

Key 52, 154.  
1 Sid. 263.  
1 Leon. 72.  
2 Saund. 379.  
380, 483.  
1 Show. 60.  
3 Mod. 258.  
4 Mod. 383.  
5 Mod. 152,  
160, 263.

1 Goldsb.  
155, 156.  
2 Goldsb.  
280.  
Comb. 150.



chargeable; and it is not necessary the Robbery should be in the Highway to charge the Hundred.  
Judgment for the Plaintiff.

## Scandalum Magnatum.

Duke Schomberg *versus* Murrey. Mich. 12 W. 3.

Cases W. 3.  
420.

**M**otion for Leave for the charging M. a Prisoner in Newgate, with a Scandalum Magnatum, and acetiam Billæ of 100 l. in order to hold him to Special Bail, for saying the Duke of S. was a Cheat, and had cheated the King and the Army.

Holt C. J. This being a poor Man, to charge him thus will be a perpetual Imprisonment to him; and Special Bail has been often demanded in these Actions, yet it has been frequently denied. But he was ordered to find two that would swear themselves worth twenty-five Pounds each, and himself to be bound in one hundred Pounds.

## SCIRE FACIAS.

Bennoyer *versus* Brace. Trin. 9 W. 3.

Cases W. 3.  
150.

Holt C. J. **T**HIS Case stands for the Resolution of the Court.

Trespas against four; Verdict and Judgment for the Plaintiff against four; all four bring a Writ of Error after Judgment given; one of them dies before the Record certified, and the Plaintiff takes out a Capias ad satisfaciend' against the Survivors: Whereon two Questions have been; 1st, Whether, if Judgment be had against two Defendants, and one dies, Execution may be had against the Survivor without a Scire fac' which we hold it may, supposing it to be within the Year; because

because there is no Change of the Record at all; and it shall not be intended there was a Release to the Party deceased. 2dly, Whether in this Case, when the Writ of Error abated by the Death of one of the Plaintiffs in Error, Execution might be taken out against the rest, without applying the Court thereof? By the Writ of Error the Hands of the Court were tied up, so that they ought not to award Execution till they are satisfied their Hands are loose. Now here is an Execution, without making this Matter appear to the Court, for which Reason it went out erroneously; and therefore let Superfedeas go, quia emanavit improvide, &c.

See Abatement, Ejectment, and Error.

## S E R V A N T S.

Anonymus. Pasch. 2 W. & M.

**O**N Evidence in an Assumpsit for Wares sold, it was held by Holt C. J. (1.)  
 That if a Man sends his Servant with ready Money to buy Meat or other Things, and the Servant buys upon Credit, the Master is not chargeable for it; but if a Servant usually buys for the Master on Tick or Credit, and the Servant buy some Things without the Master's Order, yet if his Master were trusted by the Trader, he is chargeable for the same: Here the Master at his Petition ought to take Care what Servant he employs; and it is more reasonable, that he should suffer for the Cheats of his Servant, than Strangers and Tradesmen. 1 Show. 99. 3 Salk. 234. 1 Roll. 94.

Boulton *versus* Arliden. Pasch. 9 W. 3.

Per Holt C. J. & Cur': **W**here the Master gives the Servant Money to buy Goods for him, and he converts the Money to his own Use, and buys the Goods upon Tick; if the Goods come to his Master's Use he is liable, otherwise not: In the Case of Sir Robert Wayland, he used to give his Servant Money every Saturday, (2.) 3 Salk 234, 235.

day, to defray the Charges of the foregoing Week; the Servant kept the Money, and yet the Master was held liable. And it is said, that a Note under the Hand of an Apprentice or Servant shall bind his Master, where he is allowed to deliver out Notes, though the Money is never applied to the Use of the Master: But if he is not accustomed to deliver out Notes, there his Notes shall not bind the Master, unless the Money be applied to the Master's Use.

Jones *versus* Hart. Mich. 10 W. 3.

(3.)  
2 Salk. 441.

A Servant to a Pawn-broker took in Goods, and the Party came and tendered the Money to the Servant, who said he had lost the Goods. Upon this, Action of Trover was brought against the Master; and the Question was, whether it would lie or not?

2 Cro. 202.  
4 Leon. 123.  
2 Saund. 345.  
Hob. 206.  
3 Lev. 258.  
1 Mod. 198.  
3 Mod. 323.

Holt C. J. The Action well lies in this Case: If the Servants of A. with his Cart run against another Cart, wherein is a Pipe of Wine, and overturn the Cart and spoil the Wine, an Action lieth against A. So where a Carter's Servant runs his Cart over a Boy, Action lies against the Master for the Damage done by this Negligence: And so it is if a Smith's Man pricks a Horse in shoeing, the Master is liable. For whoever employs another, is answerable for him, and undertakes for his Care to all that make use of him.

The Act of a Servant is the Act of his Master, where he acts by Authority of the Master.

## SESSIONS.

Hill. 8 W. 3.

Cases W. 3. Holt C. J. **T**HE Sessions cannot indict for Petit Treason.



## S E W E R S.

Vills of Shandrigamy *and* Sholedam. Mich.

11 W. 3.

Holt C. J.

**A** Commission of Sewers to defend the Kingdom against the Sea is very ancient, and even by special Prescription in some Cases; but Sewers for Melioration of Land are by Act of Parliament. Cases W. 3. 331.

## S H E R I F F S.

Bachkurst *versus* Clinkard. Mich. 2 W. & M.

**C**ASE against the Defendant as Sheriff of Kent, reciting a Judgment at the Plaintiff's Suit against William Dykes, for 400 l. and a Fieri facias thereon delivered to the Sheriff; that tho' Dykes had divers Goods and Chattels, yet he had neglected to seize them, and made a false Return of Nulla bona; Non cul. pleaded, on a Trial before the Lord Chief Justice Holt: The Case was thus; Dyke, Brown and others were Partners of several Goods of great Value; Brown being indebted, a Fieri facias was sued against him, and thereon these Goods were all seized, and in the Sheriff's Custody, and consequently not liable to the Plaintiff's Execution. Held by Holt Chief Justice, That being once seized and in Custody of Law, they could not be seized again by the same or another Sheriff; and if they were sold thereon, such Bargain would be void. Held also, That tho' they had joint and undivided Interests, yet only the Share or Part of Brown, and no more, could be seized upon the Execution against Brown's Goods, and consequently Dyke had Goods; and so the Return was false, and Verdict and Judgment for the Plaintiff. (1.)  
1 Show. 173.

Holt

Mich. 10 W.  
3.  
Cafes W. 3.  
250.

Holt C. J. The Sheriff has no Power to receive Money from the Defendant upon a Capias, his Business is only to execute his Writ; and if in such Case the Sheriff after become insolvent, and do not pay the Plaintiff, such Payment shall not excuse the Defendant. If Sheriff suffer one in Execution to escape, the Plaintiff has his Election to sue the Sheriff upon the Escape, or else the Defendant; but he cannot have a Capias against the Defendant without a Scire facias.

Bignoll *versus* Rogers. Mich. 11 W. 3.

(2.)  
Cafes W. 3.  
318.

**I**N Debt against Sheriff of Bucks, for the Reward given by the Statute 6 & 7 W. & M. to those that should discover and convict Clippers and Coiners. The Plaintiff had a Certificate from Lord Chief Justice Holt, who tried the Plea-factors, of his having been convicted on the Plaintiff's Evidence; which being produced, it was proved by my Lord's Clerk to the Jury. And here Holt C. J. held the Demand of this Debt of the Sheriff, after the Certificate, did attach the Debt upon him; and that the Money was to be paid out of the Profits of his County, or, upon Failure thereof, out of the Exchequer; and that in such Case the Action would lie against the Sheriff's Executor, because given by Act of Parliament, and attached in the Testator: But for the Penalty given by the Act against the Sheriff for Default of Payment, that should not affect the Executor; and that if the Sheriff paid the Debt and died, it should be allowed to his Executor.

Rook *versus* Sheriff of Salisbury. Trin. 12 W. 3.

(3.)  
Cafes W. 3.  
411, &c.

**E**Xecutor owed 100 l. by Judgment, and has Assets to pay it; and owes another Sum by Contract, for which he is sued, and suffers Judgment to go against him by Default; he pays the former Judgment, and Fi. Fac. is brought on the second; to which the Sheriff at first returns a Devastavit, and this Action is brought for a false Return. It was agreed, that if a Ministerial Officer acts falsely in his Duty, to the Prejudice of another, an Action lies for it. And here it was urged, the Sheriff had no more to do but to levy the Money de bonis Testatoris, if any

any he found, or else to return Nulla bona; and then the Plaintiff, upon Suggestion of a Devastavit, might have a Sci. fac. to enquire of a Devastavit; and if by Inquisition a Devastavit were found, to warn in the Executor to shew Cause why Judgment should not be de bonis propriis. It was further urged, that there was no Devastavit in the Case; for the suffering Judgment by Default was no Confession of Assets, but the Judgment is, if there be Assets, to be levied of them; and the Sheriff has no Return to make, but that he levied Goods to the Value of, &c. or that there are no Goods.

Holt C. J. A Devastavit is a very proper Return for the Sheriff to make; and upon such a Return Execution shall be de bonis propriis, and not a conditional one, and is never otherwise; and the Reason is, that when a Fi. Fac. goes, it is de bonis Testat. and if the Sheriff finds no Goods of Testator, and is satisfied of a Devastavit, he cannot execute the Writ of the Goods of the Executor, but ought to return the Truth, a Devastavit; and then he shall have Power to make Execution de bonis propriis. And when, upon a Plene Administravit, Assets ad valentiam are found, the Sheriff shall return a Devastavit, if he finds not Assets, and Executor shall never avoid it; here there were Assets, but liable to a former Judgment, which he might have pleaded, but omitted; and how can he take Advantage of it now?

Rich *versus* Doughty. Pasch. 3 Ann.

THE Plaintiff was a Prisoner in the King's Bench Prison, and having escaped was taken up on a Judge's Warrant, pursuant to the late Act 1 Ann. cap. 6. by a Parcel of People, whereof none was an Officer as the Statute directs; and being brought to the Sheriff, he detained him in Custody thereupon.

Holt C. J. He is brought to the Sheriff by a Warrant illegally executed, and therefore it is the same thing as if there had been no Warrant at all: And suppose the Sheriff had a Warrant for the Party, and he be forcibly brought before him by a Person that has no Authority, the Sheriff cannot detain him by the Warrant, by grafting a legal Imprisonment upon an illegal one; he cannot justify receiving any Person brought to him in illegal Custody, nor is he bound to receive him from any Body but from a

(4.)  
Mod. Caf.  
154.

Hob. 63.  
5 Mod. 8.



Constable, or other Peace Officer: Indeed, if the Sheriff asks him who brings the Prisoner what he is, and he affirms himself to be a Constable, &c. he must believe him, and make a Return accordingly. And here the Return not being filed, they gave Time to amend, which he would not do, and at another Day the Court adjudged it insufficient.

Clerk *versus* Withers. Mich. 3 Ann.

(5.)  
1 Salk. 322.  
Mod. Caf.  
290, 299, 300.

**A**N Administrator recovered Judgment in an Action, and sued out a Fieri facias, and delivered it to the Sheriff the first of August; the Sheriff seized the Defendant's Goods, and afterwards, on the ninth of September, the Administrator died: The Sheriff returned, That he had seized Goods to the Value, but they remained in his Hands pro defectu emptorum; then after this, the said Sheriff was removed, and a new Sheriff sworn in. And now the Defendant brought a Scire facias against the old Sheriff, to have his Goods again; and Judgment being against him in C. B. Error was brought here, and 'twas objected for the Plaintiff in Error, that the Execution was abated, and no Body could perfect it.

Holt C. J. This Scire facias is not maintainable: The Plaintiff's Death doth not abate the Execution, which may be perfected by the Administrator de bonis non, within the Equity of the Statute 17 Car. 2. for the Right now comes to him; and the Sheriff may proceed in it, because he hath nothing more to do with the Plaintiff, for the Writ commands him to levy and bring the Money into Court, which the Plaintiff's Death does no way hinder; and therefore he having nothing to do farther with the Plaintiff, but to execute the Writ, he may do it notwithstanding his Death: Besides, an Execution is an entire Thing, and cannot be superseded after it is begun; when Goods are once seiz'd, no Writ of Error or Superedeas shall stay the Sale; and the same Person, that begins an Execution, shall end it. So that the old Sheriff has not only Authority, but is bound and compellable to proceed in this Execution; and if he doth not, the Writ Distringas nuper vicecomitem lies, of which Writ there be two Sorts; one is to distrain the old Sheriff to sell, and bring the Money into Court; the other to sell and deliver the Money to the new Sheriff to bring it in; which plainly shews his Authority continues by Virtue of the first Writ: Here the Sheriff having seized, he is ob-

1 Sid. 129.

Yelv. 33.

1 Vent. 41.

2 Sand. 400,

345.

Moor 402.

3 Keb. 397.

1 Cro. 227,

459.

3 Cro. 390.

34 H. 6. 36.

1 Mod. 40.

3 Mod. 377.

liged to return his Writ; and when he has made a Return of Seizure of the Goods, and that they remain in his Hands for want of Buyers, that is not a Discharge of the Command of the Writ, but only an Excuse that he has not the Money; and tho' a Venditioni exponas does lie to sell, yet a Distringas is the proper Remedy. The Sheriff is to make Sale of the Goods in convenient Time; and in this Case he has made himself liable at all Events, (As of God excepted) to answer the Value according to his Return: And if the Goods be worth the Money that they are appraised at, and that he returns them of, it is not to be supposed he can want Buyers; and he is not charged to the Value they shall happen to be sold for, but to that Value which he has returned: If he makes a false Return, an Action lies against him. On the Sheriff's seizing the Goods by Writ of the Writ, the Defendant is actually discharged, and the Property devested out of him, tho' they are not sold; for the Plaintiff must depend upon his Execution, and he has no further Remedy against the Defendant, but altogether against the Sheriff: And as the Defendant hath lost his Goods upon an Execution, which the Plaintiff himself hath chose; therefore the Goods are in Custody of Law, and the Defendant is discharged thereupon.

The Judgment was affirmed.

See Execution.

## S H I P S.

Knight *versus* Berry. Pasch. 1 W. 3.

**T**HERE were several Part-Owners of a Ship, and the major Part agreed to send her in a Voyage to Sea, but the rest disagreed; whereupon the greater Number (according to the common Usage in such Cases) suggested in the Admiralty Court the Disagreement of their Partners, and then, agreeable to their Usage there, they order'd certain Persons to appraise the Ship, who accordingly set a Value thereon; and then the major Part, who agreed to the Voyage, enter'd into a Recognizance to the disagreeing Partners, in a

(1.)  
Carthew 25,  
27.  
Co.n. 1:0.  
Sum

Sum proportionable to their Shares; which is usually done in that Court, to secure the Shares in the Ship of those who disagreed to the Voyage against all Adventures: Afterwards Berry, one of the disagreeing Partners, took out a Scire facias upon such Recognizance enter'd into by Knight, and Sentence was had against him in the Court of Admiralty; from which he appealed to the King in Chancery, &c. And now Knight moved for a Prohibition, for that the Admiralty had no Jurisdiction in this Case.

Holt C. J. I hold clearly, that the greater Number of Partners are not without a proper Remedy at Law in such Case; and that an Action against the lesser Number might be framed upon the special Matter, setting forth, That whereas by the Law and Custom of this Realm, if several Partners be of a Ship, and the major Part agree to send her on a certain Voyage, and the lesser Number dissent, &c. the Agreement of the greater Number shall bind the rest; and so bring the particular Case within this Custom, by shewing the Partnership and what the Plaintiffs have agreed to, and the Disagreement of the Defendants the lesser Number, &c. by which the Profits of the Voyage were lost ad damnum, &c. And in this Case, altho' it was urged to be the constant Course of the Admiralty to proceed on these Recognizances, the Court held, that that cannot prevail against the Statute of H. 4. for the Admiralty hath no Conulance of this Matter; therefore all that was done, was coram non iudice: And a Prohibition was granted.

Hardr. 473.  
2 Hen. 4.  
c. 11.  
13 R. 3. c. 5.

Boulston *versus* Sandiford & al'. Hill. 2 W. & M.

(2.)  
Sinn. 278.  
1 Show. 101,  
104.

**A**ction of the Case, in which the Plaintiff declares against the Defendants as Owners of a Vessel, and shews that they appointed J. S. Master, who received such Goods aboard to be carried from London to Topsham; and that the Defendants undertook to carry them safely for Hire, &c. but that the Goods were damaged; upon which, &c. On Not guilty pleaded, the Jury found a special Verdict, that the Defendants were Part-Owners, but there were other Owners not named, and that all the Owners constituted the Master and Mariners; that the Goods of the Plaintiff were delivered to the Master to be carried as above, and that they were damaged, &c. And if (the Action not being against all the Owners, but only the Defendants)



endants) Judgment should be for the Plaintiff was the Question?

Holt C. J. The Action might have been brought against the Master alone, or against all the Owners, because they have a Benefit, i. e. the Freight; and if there be a Default in the Master, they are chargeable, for the Master is their Servant, and appointed by them. And here the Defendants are not chargeable in respect of the Ownership, but of the Advantage which they have by the Freight; and therefore where Part of the Owners would employ the Ship, and the others would not, there the Advantage of the Voyage will belong to them who fit and employ the Ship; and if any Damage be to the Lading, the Action shall be only against them, and not against the others: So Ownership is not the Foundation of this Action, but the Trust and Recompence; and the Trust is as well with the others as with the Defendants, for the Goods were delivered to the Master, and his Receipt is that of all the Owners who appointed him; and in every Trust there is a Contract implied; and the Trust being in all the Owners, the Contract shall be so also. The Case of a common Carrier doth not differ from the present Case; and if it was in such Case, all the Partners ought to be joined, for as they are all Parties to the implied Contract, they should be joined in the Action; which not being done, the Defendants may take Advantage of it upon the General Issue: And if an Action had been brought on the Plaintiff's Promise to pay so much for the Carriage of the Goods, there is no Doubt but the Defendants might have taken Advantage on the General Issue, that this Promise was also with A. and B. not named, &c. Either Master or Owners may bring an Action for the Freight; but if the Owners bring the Action, they must all of them join, therefore they must all be joined; as the Freight belongs to all, so all are equally undertaking; and it would be very unreasonable, that all should have the Hire, and yet some only pay for the Damage: In this the Employment is joint, and like to the Case of joint Officers, they all make but one Person, and a Breach of Trust in one, is a Breach in all of them; the Consideration being to be paid to all the Owners, of consequence all must be charged, and the Benefit is the Cause of the Charge. Upon the whole, if the Plaintiff will charge the Owners, he must charge them in such a manner as they are chargeable, which is not observed in this Case.

Judgment for the Defendants.

Molloy 208;  
209.  
2 Cro. 189.  
Hutt. 122.  
3 Lev. 258.  
1 Danv. Abr.  
3, 6, 7.  
2 Saund. 115.  
2 Lev. 172.  
Vaugh. 242.  
1 Bull. 16.  
1 Mod. 18.  
3 Mod. 244.  
4 Mod. 17.

Edmonson *versus* Walker. Mich. 2 W. & M.

(3.)  
1 Show. 177,  
178, 179.

**T**HE Defendant libels in the Admiralty Court as Executor to her Husband, late Master of a Ship, against the Ship and Apparel; and hath the same decreed to be sold for Payment of the said Master, and Seamen's Wages: And on a supplemental Libel, certain Sails belonging to the said Ship were decreed to be delivered up, and an Account rendered thereof, that they might be sold, &c. And the Party who had them in Possession ordered to be attached until he should deliver them.

2 Inst. 168.  
12 Rep. 79.  
2 Roll. 493.  
2 Cro. 514.

It was moved for a Prohibition, suggesting the Statute of R. 3. that the Admiralty had nothing to do with Land Affairs, and all Pleas of Trespas, Case, &c. were pertaining to the Courts of Common Law; that the Court of Admiralty could do nothing here, because the Possession and Detainer were at Land, and there a Property is vested; but if there be none, the Court was at Land, and therefore determinable at Law: The Reason why Wreck is determinable by the Common Law, is because 'tis always cast upon the Land: And where Part is triable at Common Law, and Part by the Admiral Law, the Common Law shall be preferred, &c.

Holt C. J. Mariners Wages are within their Jurisdiction: They may sell the Ship, and the Sails and Tackle are Part of it, and remain Part of it when they are on Shore; the Ship it self is at Land when in Harbour & *infra* Corpus Comitatus: And as to the Cases of Trespas done *infra* Com. 'tis true they are out of the Jurisdiction of the Admiralty; but here is only a Condemnation of it, as an Accessary or Appurtenance. If you come in and plead Property, they will and must allow it; otherwise we will prohibit them; and agreeable to that, you must alter your Suggestion.

Anonymus. Hill. 13 W. 3.

(4.)  
3 Salk. 23,  
24.

**I**F a Ship is lost before she arrives at any Port of Delivery, the Seamen lose all their Wages; but if she be lost after Arrival at a Port of Delivery, then they shall only lose their Wages from the last Port: But in Case the Mariners run away, tho'

tho' after they come to any Port of Delivery, they lose and forfeit all their Wages.

1 Sid 129.  
Sec 2 Geo. 2.  
c. 36.

A Master may pawn his Ship for Relief in Extremity; for he being constituted Master hath implicitly a Power to preserve the Ship in Cases of Danger: Though he cannot do it for his own Debt, because he has neither a Property or Power for that Purpose; and if the Admiralty should confirm an Hypothecation of that Nature, a Prohibition shall be granted.

Hob. 212.  
Moor. 918.

## S I M O N Y.

Bishop of St. David's *versus* Lucy. Pasch. 11 W. 3.

**T**HIS was the Case of Dr. Watſon Biſhop of St. David's, who was convened before the Archbiſhop of Canterbury at Lambeth to answer divers Articles exhibited againſt him, by which he was charged with Simony in his Office of Biſhop; for taking Money for Curacies, and admitting Perſons into Orders, and for Corrupt Inſtitutions, &c. And now it was moved for a Prohibition, and objected that the Archbiſhop had no Power to convene before himſelf any Suffragan for a Viſde-meanor.

Carthew  
484, 485.

Holt C. J. The Selling of a Curacy, and taking Money to admit Men into Orders is Simony, and puniſhable by the Metropolitan; and after many Debates, a Prohibition was denied: Afterwards they proceeded at Lambeth againſt the Biſhop upon the Articles, and there a Sentence of Deprivation paſſed againſt him; from which he appeal'd, and that Sentence was affirm'd by the Delegates.

1 Roll. Abr.  
Davis Rep.  
3.

SLANDER.



## S L A N D E R.

*At Nisi prius coram Holt. Mich. 11 W. 3.*

(1.)  
Cases W. 3.  
344.

**A**N Action of Slander, in which the Plaintiff set out, That he was a Pawn-Broker by Trade, and that the Defendant said these Words of him, Thou art a broken Fellow; and laid and proved Loss of Customers, viz. That some who were coming to pawn Goods with him forbore coming, and others took away theirs by Occasion of the Words.

Holt C. J. The Trade of a Pawn-Broker is an honest lawful Trade, tho' it lies under Suspensions; for it is lawful to buy old Goods, and sell them again, and so to lend out Money upon a Pledge; but a Broker ought to be very cautious in buying stolen Goods; yet if he should buy stolen Goods, not knowing them to be such, it is no Crime.

2 Inst. 52.

And upon Points arising upon this Case, he said, one might take a Warrant to search a suspicious House, upon a Felony committed; but it is at his Peril to execute it in due Time, and at suspected Houses only.

*How versus Prin. Mich. 1 Ann.*

(2.)  
Farrell. 107,  
109.

**I**N Case, for saying of the Plaintiff, who intended to stand Candidate for Knight of the Shire, and was a Justice of Peace and Deputy Lieutenant of the same County, that he was a Jacobite, and for bringing in the Prince of Wales and Popery, to destroy the Nation, &c. The Plaintiff had a Verdict and 400 l. Damages; and then Motion was made in Arrest of Judgment, for that the Words were not Actionable, upon which there were many Hearings and Objections by Counsel.

Holt C. J. The Question here is, whether the Words be actionable? I am not for declaring my Opinion what the Law would be, in case the Words had been spoken of a private Man, because it is going further than we need, and to prejudice a Point that may come in Question; and therefore I give this Opinion only on Account of the Person of whom they are spoke, as it appears on the Decla-

ration, that he was a Justice of Peace in the County, and likewise a Deputy Lieutenant: And an Action lies against a Man for Words spoken of one in a publick Office, upon two Accounts; first, to charge him with ill Principles, that are of such a Nature as make him unfit to bear that Office or Employment, is actionable; for if he had such Thoughts to bring in the pretended Prince of Wales into this Kingdom, it is necessary he should be removed from his Trust; and he as Justice of Peace ought to punish Popery: Sure then, if such Person is for introducing Popery, he ought not to be trusted with an Office, the Duty whereof is to punish and suppress it. Secondly, he is Deputy Lieutenant, and consequently he has Power to defend the Government of the County against all Pretenders; and his being of such Principles as he is here charged with, makes him obnoxious to the established Government, and not to be entrusted by it, in a Post that is for Defence thereof; when in truth it may be for the Advantage of the Government to continue him in it, and a Disreputation to him to be turned out of it upon Suspicion. The Case of Sir William Clarges in the Common Pleas is much like this; he set forth, that he was a Justice of Peace, Deputy Lieutenant of such a County, and that at the Time of speaking the Words he intended to stand Candidate for a Borough, to be a Burgess in Parliament; and the Defendant said of him, that he was a Papist, which only shewed what his Principle and Affection was; yet being spoke of one in Office of Trust, the Court held it actionable, for the very being a Papist is good Cause to remove him out of his Place. It has been adjudged, that to call a Justice of Peace Blockhead, Ass, &c. is not a Slander for which Action lies, because he was not accused of any Corruption in his Employment, or any ill Design or Principle; and it was not his Fault that he was a Blockhead, for he cannot be otherwise than his Maker made him: But if he had been a wise Man, and wicked Principles were charged upon him, when he had not them, an Action would have lain; for tho' a Man cannot be wiser, he may be honest than he is. If a Person be in a Place of Profit, and he is accused of Insufficiency, he shall have Remedy by Action: 'Tis otherwise, if he be only in a Place of Honour, tho' even there, if he is charged with ill Principles, and as disaffected to the Government, he shall have an Action for such Scandal to his Reputation.

The Plaintiff had Judgment.

3 Lev. 50.  
1 Lev. 335.  
3 Rep. 191.  
Yelv. 104.  
1 Brownl. 5.  
March 4.  
1 Roll. Abr.  
86.  
2 Salk. 659.

The Queen *versus* Langley. Hill. 2 Anni.

(3.)  
2 Salk. 697,  
698.  
3 Salk. 190.

**U**PON an Indictment against the Defendant, for saying to the Mayor of S. You Mr. Mayor, I care not a Far for you; and at another Day, You are a Rogue and a Rascal: It was insisted, on a Demurrer to this Indictment, that the Words not being spoken of him while in Execution of his Office, it was no Offence indictable.

11 Rep. 95.  
3 Cro. 78.  
Moor 247.  
1 Vent. 16.  
1 Sid. 270.  
1 Lev. 139.

Holt C. J. These Words are not indictable, because the Mayor was not in the Execution of his Office, nor a Patent Officer; for it would have altered the Case, if he had been a Justice of Peace by Commission from the Queen, when Indictment should have laid, because the Words would have been an Aspersion upon the Queen and Government in general, by whom he was employed. It doth not appear that he was a Justice of Peace, or if he was, that 'twas by Appointment of the Queen, but of the Corporation; 'tis true, if these Words had been Written as they were spoken of the Mayor, an Indictment would lie, for *littera scripta manet*; and there are many Cases which prove, that the same Words when written are actionable, which are not so when spoken. Where Words directly tend to the Breach of the Peace, as if one Man challenge another, &c. it is indictable: But for these petit Offences, that are *contra bonos mores*, the Law has another Provision, by requiring Surety for the Peace and Good Behaviour; in Default whereof the Magistrate may commit the Offender, when spoken out of Court; and when spoke in Court, he may be proceeded against summarily, and fined for the Contempt.

The Indictment was quashed.

Baker *versus* Pierce. Mich. 2 Ann.

(4.)  
Mod. Cal. 23,  
24.

**C**ASE against the Defendant for these Words, You stole my Boxwood, and I will prove it: And now it was moved in Arrest of Judgment not to be actionable; for to say, You are a Thief, and stole my Timber, or my Corn, Hops, Apples, &c. no Action lies, because where Words charge one either with Trespass or Felony, if there be not other Words that shew it to be Felony, the best Sense shall be taken.



Holt C. J. In later Times, the Opinions have been in many Instances different from those of former Days, with respect to Slandorous Words; for it was held formerly, that there was a Difference between saying, Thou art a Thief, and hast stolen my Wood, and Thou art a Thief, for thou has stolen my Wood, and Judgment hath been both ways: But later Opinions make no Difference, if the Words are spoken at the same Time; and these are scrambling Things, that have gone backwards and forwards, and the idle People in the Country, that privately cut and carry away Coppice Wood, are in common speaking called Wood-Stealers. I have heard my Lord Hale say, that he knew no set Rule for Actions for Words, but that all Words stood upon their own Feet: To say a Man has the Pox, is not actionable; but if the Words be that he has it, and got it by a Pellow-hair'd Wench in Moor-fields, has been adjudged actionable; which last Words do not carry a violent Intendment that the Speaker meant the French Pox, but the Sense leads more that way than another. And it has been agreed, that Stealing, and feloniously Stealing, are not the same; for in common Par- lance Stealing doth not always import Felony, as to cut and carry away Furze is a Stealing, but not a felonious Taking; tho' this was held by Powel J. to be properly Trespas: And the Chief Justice also said, It was not worth while to be learned on this Subject, but where-ever any Words tended to take away a Man's Reputation, he would encourage Actions for them; because so doing would much contribute to the Preservation of the Peace.

The Plaintiff had Judgment.

Hob. 331,  
268.  
2 Cro. 114.  
1 Lev. 280.  
1 Sid. 432.  
1 Vent. 50.  
1 Cro. 509.  
1 Jo. 68.  
2 Cro. 674.  
166.  
1 Mod. 22.

## S O L D I E R S.

— and Crouch. Mich. 11 W. 3.

**H**ALE moved, upon Affidavit, to have him discharged upon the late Act of Parliament for disbanding the Army, whereby Soldiers are exempted from Suits for three Years.

Cases W. 3.  
336.

Holt C. J. We can order common Bail, but he must discharge himself of the Action by pleading the Act, &c. and the Plaintiff may traverse his Allegations; and so was the Rule.

Spiritual

## Spiritual Courts.

Johnson *and* Ley. Mich. 7 W. 3.

( 1. )  
Slein 589.

**I**N Prohibition; the Dean of Salisbury had a Peculiar; and made Letters of Request to the Dean of the Arches; it was objected, that this was per Saltum, and that he ought to have made his Request to the immediate Ordinary, and Hob. 16, 186. and Cro. Car. 262. were cited; non allocatur.

Holt C. J. There are three Sorts of Peculiars. First, When the Archdeacon, &c. have a Peculiar within the Diocese, and subject to the Jurisdiction of the Ordinary: Secondly, When one has a Peculiar not subject to the Ordinary, but to the Archbishop; and the Third is, When one has a Peculiar subject neither to the Ordinary nor to the Archbishop; as there are some. And tho' the Dean of Sarum is to some Purposes subject to the Jurisdiction of the Bishop; yet as to this Peculiar, it is all one as if it was in a Stranger: And it is not under the Jurisdiction of the Bishop of Sarum, more than the Bishop of London; and if he had made Request to the Bishop of Sarum, and the Party had been cited upon it, such Citation had been within the Statute of 23 H. 8.

Mandamus to grant Administration. Mich.  
9 W. 3.

( 2. )  
5 Mod. 374.  
Vide 1 Salk.  
250, 251.

**A** Mandamus was granted last Term to the Judge of the Spiritual Court to grant Administration to J. S. who, as he suggested, was next of Kin to the Intestate.

Northey moved for a Superfedeas to it; for that the Fact was, That J. S. being cited refused to come in, upon which another of the Kindred sued for Administration; but was opposed in it, by one who pretended there was a Will. Which Matter was now under Controversy before the Judge there; and therefore till that was determined, the Spiritual Judge could not obey the Mandamus.

Holt C. J. When there is no Controversy, we do so; but here is a Controversy; and we will not grant a Man-

damus

damus till it be determined: For suppose the Will should seem good; what then will the granting Administration signify?

The King *versus* Sanchy and Tipper. Hill.  
9 W. 3.

THE Defendants, being Quakers, were committed to Gaol, for refusing to answer on their solemn Affirmation in a Cause of Substraction of Tithes; and it was moved they might be discharged, because in the late Act for permitting the Quakers solemn Affirmation, there is a Clause appointing a speedy Remedy against Quakers for Tithes, viz. by Complaint to a Justice of Peace, which, it was said, takes away the Spiritual Jurisdiction; for where the Common or Statute Law gives Remedy in foro Seculari, whether the Matter be Temporal or Spiritual, the Consequence of that Cause belongs to the King's Temporal Courts, unless the Jurisdiction of the Spiritual Court be saved or allowed by the same Statute. 1 Inst. 96. b. Jo. 320. (3.) Cases W. 3. 165.

Holt C. J. The Remedy by the Statute seems only an additional Remedy: The Ecclesiastical and Temporal Courts have herein a concurrent Jurisdiction; as in the Case of a Pension payable out of a Parsonage by Prescription, notwithstanding the Opinion of my Lord Coke on the Statute of Circumspecte agatis, you may sue in the Spiritual Court for the same, tho' a Writ of Annuity lies also at Common Law. But where the Statute alters the Offence, and makes it of a higher Degree, there it takes away the Ecclesiastical Jurisdiction; as in the Case of Polygamy, after a Man has been tried for the same; so in Case of a Bastard-Child, where a Man has been adjudged the reputed Father of it, they cannot proceed for Slander on that Account. Then another Exception was taken, that they were committed for not paying Tithes, or other Ecclesiastical Duties, in the Disjunctive, without shewing certainly for what the Suit was; for tho' the Words of the Statute be in the Disjunctive, yet in the Commitment it should be precisely shewn; and for this Exception the Defendants were discharged.

Holt C. J. If a Pension be by Prescription out of a Rectory inappropriate, tho' the Rectory come into Lay Hands, yet  
Pasch. 12 W. 3.  
Cases W. 3.  
397.



yet it may be sued in the Spiritual Court, because it might have commenced by a Spiritual Act; and if such a Prescription be denied, it shall be tried there; but if a Modus Decimandi be pleaded, it shall be tried at Common Law; and if it be not found, a Consultation shall go.

*Regina versus Harris.* Pasch. 7 Ann.

(4.) **M**R. Pengelly moved to quash an Excommunicato capiendo. First, It doth not appear, that there was any Cause depending in the Ecclesiastical Court. Secondly, It doth not appear, that it was of Ecclesiastical Cognisance.

*Mr. Raymond contra:* As this came from the Ecclesiastical Delegates by Appeal, your Lordship will take it to be of Ecclesiastical Cognisance.

*Holt C. J.* Tho' Ecclesiastical Delegates do give Sentence, and award Execution, it doth not follow that it is of Ecclesiastical Cognisance.

The Writ was quashed.

*Bewick and Twisden.* Mich. 7 Ann.

(5.) **A** Libel in the Spiritual Court against a Parson of a Donative for Preaching without License; and for a Prohibition, it is suggested, that it is a Donative which is exempted from all ordinary and archiepiscopal Jurisdiction, and that Anne Thornton was seised thereof in Fee, and that they, whose Estate she had had, Time out of Mind have used to grant that Donative to any Person for Life, at their free Will and Pleasure, without Institution and Induction; and that the Chancellor of the Bishop of Durham prosecuted the Parson in his Court for Preaching without License.

*Montague:* No Man can preach in a Donative, if he hath not the Bishop's License.

The Seisin of the Donative is not laid to be by Grant or by Prescription, for it is said that prima fundatione inde she was seised of this Chapel, so that this is a Sort of Prescription from the Foundation. *Eyre contra:* They cannot proceed in that Court to deprive a Man in such a Case as this.

The Libel chargeth the Chaplain for officiating on this Donative without a License from the Ordinary. Now a License from him is not absolutely necessary, tho' it is from the Archbishop of the Province, and it doth not appear by the Libel, but that he might have had a License from the Archbishop.

It is sufficient to have a License from the University, or from any Bishop, as well as that particular Ordinary. The Statute saith, that he that preacheth without License, shall be sent to Gaol by two Justices. And it is a certain Rule, that when a Statute gives a particular Penalty, and points out a particular Way to recover it, the Proceedings cannot be by Way of Indictment, nor can the Spiritual Court have any Conscience of it.

Parker: As to the Statute of Uniformity, there is a formal Punishment; but the Spiritual Court is to stop him from Preaching, but not to punish him with a temporal Punishment.

Eyre: Licenses are only for Lecturers, and Institution and Induction for Parsons is sufficient without Licenses. If he is licensed to preach generally, that gives him Liberty to preach any where.

Holt C. J. I doubt that. The Ordinary in this Case cannot proceed to punish him for Preaching without a License, but he may proceed to cite him, to convict him for so doing.

Parker: In Case of a Donative, the Ordinary may compel the Patron to put in a Clerk.

Holt C. J. He cannot. Vide Co. Litt. 344. If he preach any Thing against the Doctrine of the Church, or marry without License, the Ordinary may proceed to punish him.

A Prohibition granted as to the Suspension, and the spiritual Censures, and putting him out of Possession; but not as to certifying to the Justices for Preaching without License..

Anonymus. Hill. 7 Ann.

A Libel in the Spiritual Court, for brawling and striking in the Church. The Defendant suggests, that when a Ban is acquitted of an Offence at the Common Law, he ought not to be prosecuted in the Spiritual Court, or the Clergy falsified; and farther set forth the Statute of E. 6. for quarrelling in the Church-yard and then says that for Bawling in the Church, and

( 6. )

for

for Striking there, an Information was brought; and that upon the Trial they were acquitted; and that for the same Thing they are now libelled in the Spiritual Court.

Eyre: They ought not to have a Prohibition; they ought to have set forth in particular what the Information was. A Man may be twice prosecuted for the same Thing in different Respects; as for striking a Clerk, an Action of Trespass will lie, and in that he shall recover Damages; and he may be prosecuted in the Spiritual Court for Brawling. Coke upon the Statute of Circumspecte agatis.

Holt C. J. If a Man be acquitted of the Battery at the Common Law, that does not acquit him of the Brawling; and the Information is for the Battery in the Church, and not for Brawling.

Holt and Powel: You ought to have pleaded your Acquittal as to the Battery, and produce an Affidavit that they refused your Plea.

Tho' the Offence was committed at the same Time, yet it may be distinct; and Brawling is a distinct Offence of it self: For Striking in the Church a Man is to be excommunicated, but not for Brawling. Powell J. cited the Abbot of St. Alban's Case.

Holt C. J. Where there are Words which come to Blows, or Blows to Words, it is the same Act; and after an Information and Acquittal, you must plead that in Bar. The Prohibition was denied.

Butler *versus* Hammond. Hill. 7 Ann.

(7.) **M**R. Raymond moved to set aside a Plea Puis darrein Continuance.

Doctor Butler being Commissary and Judge of the Court in Sudbury in Suffolk, upon Administration granted of the Goods of A. the Defendant Hammond became bound in the Bond according to the Statute, that C. who was the Administrator should bring in a full Inventory; and there being a Distribution decreed by that Court to several of the Intestate's Relations, the Administrator would not comply with it, and therefore was excommunicated; and the Bond was sent to Doctors Commons, in order to be put in Suit for the Benefit of the Intestate's Relations: The Defendant craved Oyer of the Bond, and pleaded that there was an Account given in, and Issue was joined, that there was no such Account: And now he comes



and offers a Plea of a Release, which I hope this Court will not oblige us to accept.

If it should be in the Commissary's Power to release this Bond, then the Statute would be of no Force. A common Voucher cannot release Errors in a Common Recovery.

Powell J. The Doctor has not done well in giving this Release, and it is a Breach of Trust. Qu. Quid inde venit.

Blackham's Case. Hill. 7 Ann.

**I**N Trover, before Holt C. J. the Plaintiff proved the Goods to be in his Possession, and to be taken away by the Defendant. The Defendant shew'd, that these were the Goods of Jane Blackham in her Life-time, and that the Defendant had taken out Letters of Administration to her, and so was entitled to the Goods. Upon this the Plaintiff proved, that some few Days before her Death she was actually married to him; and in answer to that, it was insisted that the Spiritual Court had determined the Right to be in the Defendant; for they could not have granted Administration to the Defendant, but upon supposing there was no such Marriage; and that this Sentence being of a Matter within their Jurisdiction, was conclusive; and could not be gainsaid in Evidence.

Et per Holt C. J. A Matter which has been directly determined by their Sentence, cannot be gainsaid. In the Point directly tried, 'tis otherwise if a collateral Matter be collected or inferred from their Sentence, as in this Case.

( 8. )  
1 Salk. 290,  
291.

1 Lev. 235,  
236.  
1 Sid. 359.  
Raym. 405.  
2 Keb. 357.

S T A T U T E S.

Bennet *versus* Talbot. Hill. 8 W. 3.

**T**RESPASS for Entering and Hunting in Ground, the Defendant being an inferior Tradesman, contra pacem Dom. Regis, & contra formam Statuti, &c. It was here objected, that contra formam Statuti goes to the whole Declaration, wherein one of the Trespasses is not against any Statute.

( 1. )  
1 Salk. 212.  
5 Mod. 307.

3 Cro. 231.  
1 Vent. 103.  
Allen 43.

Holt C. J. If an Act of Parliament deprives a Man of any Benefit he had before at Common Law, or increases a Penalty, in such Case if one declares upon the Statute, and does not bring himself within it, and concludes contra formam Statuti prædicti, it is nought: But if there be no Act of Parliament at all, and the Plaintiff concludes contra formam Statuti, 'tis only Surplusage. The Question is now, how the Plaintiff shall declare in this Case? In the Count several Trespasses are alledged, the last of which is only within the Statute, and the Conclusion is contra formam Statuti: Though here in a grammatical Construction it goes to the whole Declaration, yet in Law it shall go but to the Hunting; and therefore why may we not apply it only to the latter Part, and reject it as to the Rest for Surplusage, as was done in an Indictment in Harwood's Case.

4 & 5 W. & M.

Afterwards it being moved again, the Court was of Opinion, that where a Statute makes an Offence, the Conclusion must be contra formam Statuti; but this was an Offence before the Making of the Act, and therefore the Declaration was well enough.

Judgment was given for the Plaintiff.

*Platt versus Hill.* Mich. 10 W. 3.

(2.)  
3 Salk. 330.

IN this Case, Holt C. J. held, That if the Plaintiff misrecites a General Statute, the other Side cannot plead Nul tiel Record, but must demur; and then if the Misrecital is of Substance, and the Party upon reciting it concludes contra formam Statuti prædicti, 'tis naught; though if he conclude contra formam Statuti in hujusmodi casu editi, &c. 'twill be good. Where the Defendant will take Advantage of a Misrecital of a private Act of Parliament, he ought to plead Nul tiel Record, or alledge that 'tis farther enacted so and so, &c. and if he demurs to the Declaration, it shall be taken to be confessed as 'tis pleaded.

*Mills versus Wilkins.* Hill. 13 W. 3. Mich.  
2 Ann.

(3.)  
Mod. Cases  
62.

THE Defendant in Trespass justified as an Officer by Virtue of the Statute 1 Jac. 1. c. 22. setting forth the Title of the Act variant from the Record: To this

Plea Exception being taken, that there was no Statute so entitled, &c. It was answered, that the Title is no Part of the Act; and that an Act may be without any Title, as most of the antient Statutes are; therefore a Variance in the Title is nothing.

Holt C. J. It is true, the Title of an Act of Parliament is not a Part of the Law or enacting Part, no more than the Title of a Book is Part thereof; for the Title is not the Law, but the Name or Description given to it by the Makers: So the Preamble of a Statute is no Part of it, but contains generally the Motives or Inducements thereof; and therefore it is not necessary to set forth the Title or Preamble, but generally that at a Parliament held at such a Time, &c. Enactit. fuit; and by setting out the Title of the Act specially, you tie your Justification to an Act thus entitled, and if you cannot produce one, you are gone: And for this Reason the Justification is ill.

3 Keb. 641,  
648.  
Dyer 324.

Judgment for the Plaintiff.

See Deer-Stealers.

## S T O C K S.

Callonel *versus* Briggs. Trin. 2 Ann.

**A**ction upon an Agreement, that the Defendant should pay so much Money six Months after Contract, the Plaintiff transferring Stock; and at the same Time the Plaintiff gave a Note to the Defendant to transfer the Stock, he paying the Money, &c.

1 Salk. 112,  
113.

Holt C. J. If either Party sue upon this Agreement, the Plaintiff for not paying, or the Defendant for not transferring, to maintain the Action one must aver and prove a Transfer or Tender, and the other Payment or a Tender; for Transferring in the first Bargain, was a Condition precedent: And tho' there be mutual Promises, yet if one Thing be the Consideration of the other, here a Performance is necessary to be averred; and he obliged the Plaintiff to prove his Transfer, or a Tender and Refusal to accept within the six Months.

Hob. 88.  
Raym. 133.  
Sid. 423.

And



Mod. Cases  
L. and E. 219.

And it has been lately adjudg'd, that if the Plaintiff do not set forth in his Declaration that he was at the South-Sea House, &c. on the Day agreed, at such a Time, and staid 'till the last Hour of the Day to transfer his Stock, he cannot maintain his Action.

## S U P E R S E D E A S.

Anonymus. Mich. 8 W. 3.

Cases W. 3. Holt C. J.  
105.

**A**N Audita querela is no Superfedeas in it self, being not like a Writ of Error; but the Party may go on with his Execution 'till there be a Special Superfedeas; and tho' an Audita querela be allowed, no Superfedeas shall be granted, 'till the Matter, whereupon the Audita querela is grounded, be proved by Two Witnesses.

## S U R E T Y.

Anonymus. Trin. 12 W. 3.

Cases W. 3. Holt C. J.  
413.

**B**y Law, none can be compelled to find Surety for his Good Behaviour, except it be by antient Custom within a Leet, or for Aggrancy, or some certain Offence; and here one being committed thus, Whereas A. has been convicted of a Misdemeanor, and cannot find Security for his Good Behaviour; therefore, &c. And here could be no Certiorari, there being no Record of the Conviction; the Party being brought up upon Habeas Corpus was discharged on Motion. Per Cur'.

## SURRENDER.

Leach and others *against* Thompson. Mich.  
3 W. & M.

**E**RROR in B. R. sur Judgment in C. B. pro quer' <sup>1 Shaw. 296.</sup>  
 en Ejectment, there brought by Thomas Thompson  
 against Sir Simon Leach & al' Defendants, upon  
 the Demise of Ch. Leach, of the Manor of Bulk-  
 worthy. Wherein upon Non Cul. pleaded, the Jury find a  
 Special Verdict, That Nich. Leach was seised in Fee of the  
 Manor and Lands in the Declaration, and by his Last  
 Will in Writing, bearing Date Decemb. 9. 19 Car. 2. de-  
 mised the Premises to his Brother Simon Leach for Life,  
 Remainder to the first Son of the Body of the said Simon,  
 and the Heirs Male of the Body of such first Son, and in  
 like Manner to the second and third Son, &c. and for Want  
 of such Issue of the said Simon Leach, the Remainder to Sir  
 Simon Leach and the Heirs Males of his Body; and for Want  
 of such Issue, to the right Heirs of Nicholas the Testator for  
 ever; and that the said Nicholas died seised of the Premises,  
 and after his Decease the said Simon entred, and became sei-  
 sed for Life, with Remainder over, as aforesaid; and being so  
 seised, made a Deed bearing Date 23 August, 25 Car. 2. sealed  
 and delivered to the Use of Sir Simon Leach, (but he was  
 not present) which Deed the Verdict sets forth in hæc verba,  
 and by it he granted and surrendered unto the said Sir Si-  
 mon Leach, and his Heirs and Assigns, the said Manor and  
 Lands, and Reversion and Reversions, Remainder and  
 Remainders of the same; To have and to hold the same to  
 the said Sir Simon Leach and his Heirs, to the Use of him  
 and his Heirs: And further, That the said Ch. Leach (the  
 Lessor of the Plaintiff) the first Son of the said Simon  
 Leach, was born the first of November, 25 Car. 2. and not  
 before; and that Simon Leach, from the Time of Sealing  
 the Deed to the 25th of May, 30 Car. 2. did continue pos-  
 sessed of the Premises; and that then, and not before, Sir  
 Simon Leach accepted and agreed to the said Surrender,  
 and entred into the Premises; and that afterwards the  
 said Simon Leach, Brother of the said Nich. the Testator,  
 died, and the said Ch. Leach, the Son, after his Decease,  
 entred,

entred, and made the Lease in Narr' to the Plaintiff, who by Virtue thereof entred, and was possessed, and so continued till the Defendant (Sir Simon Leach & al') ejected him. But whether, upon the whole Matter, the said Simon Leach did surrender the said Manor and Premises to the said Sir Simon Leach before the Birth of Charles, they doubt; and if he did not, &c. then they find the Defendants guilty; and if he did surrender before the Birth, then they find pro Def'.

The Chief Justice in C. B. Powell and Rokeby, after some Arguments at the Bar pro quer', held, That it was no Surrender, 'till such Time as Sir Simon Leach had Notice of the Deed of Surrender, and agreed to it, and so the Remainder was vested in Charles the Son, and not defeated by the Agreement of Sir Simon Leach, after the Birth: And Judgment there pro quer', contra Opin. Ventris.

Holt C. J. As to the Words Release and Grant in the Deed, they signify nothing; for a Grant in this Case could be of no Avail without Liberty; though the Words of the Deed be Grant, yet it must be pleaded as a Surrender, and not otherwise; That a Surrender is a particular Sort of Conveyance, and Agreement is necessary to perfect it; and so Judgment was affirmed, and afterwards that Judgment reversed in the House of Lords; all the Barons being of Opinion for the Plaintiff in Error.

## T A I L.

Symonds and Cudmore. Hill. 2 W. & M.

(1.)  
Skin. 284.

**U**PON a Special Verdict in Ejectment, the Father Tenant for Life, with Power to make Leases for twenty-one Years, three Lives, or ninety-nine Years determinable upon three Lives, Remainder to his Son in Tail, Remainder to the Father and his Heirs; the Father leases for twenty-one Years, rendring 8l. per Annum, and dies; the Son, being Tenant in Tail, leases to J. S. for twenty-one Years, to commence after the Determination of the former Term, rendring 10s. per Annum, and dies during the first Term, having Issue; the Issue



Issue after the Death of his Father levies a Fine, and declares the Use to himself in Fee; the first Term ended, the second Lessee enters; upon whom the Issue enters, and the Lessee brought the Action.

The Question was, if a Lease for Years made by Tenant in Tail, to commence in futuro, and the Lessor dies before the Commencement, and the Issue in Tail (there being a prior Lease in esse, so that he could not enter) levies a Fine to the Use of himself in Fee, if after this Fine, he might avoid this future Lease, and enter upon the Tenant when it commences in Possession?

In another Term Holt C. J. agreed, that Judgment should be given for the Defendant; But he said, if he had been Tenant in Tail in Reversion, without the Fee also in him who had made this Lease, and after his Issue had levied the Fine, that Judgment ought to be given for the Plaintiff: For he said, when Tenant in Tail makes a Lease for Years, to commence after a former Lease, and dies before the Commencement of this Lease; this second Lease is void at the Election of the Issue; and the Issue is in of an Estate-tail, not charged to this future Lease, and the whole Estate-tail descends to the Issue; for till the Lessee enters by Force of the Lease, he is not Tenant for Years; but has only a Right to have the Land: And an Entry is necessary to have an Estate. And when he who leased dies, his Issue is in of a Right paramount the Lease; and therefore he shall not be charged with such future Interest, but it is void. And he said, that the Fine here does not extinguish the Election, no more than in the Case of Baugh and Blunden, 1 Cr. 302. where it was at the Election of the Party to have a Lease for Years, a Disseisin or not, and he levied a Fine; this does not extinguish the Election, but the Comtee shall have it; but otherwise if it be an absolute Disseisin, according to Buckler's Case, 2 Rep. and he said no Aa here is requisite on the Part of the Issue, or appointed by the Law; and he said that the Lease here, si contingat that the Tenant in Tail who made it dies during the Continuance of the former Lease, is as void as where Tenant in Tail leases for Years, to commence after his Death; for now by the Statute subsequent, this Lease is to commence after the Death of Tenant in Tail; in both Cases it is void, or not, at the Election of the Issue; and for these Reasons, if the Case had been that Tenant in Tail had made a Lease to commence as here,  
and

and died; and his Issue levied a Fine, the Conusee might avoid the Lease: But insomuch that in our Case the Tenant in Tail Lessor had also the Reversion in Fee, expectant upon this Estate-tail, in him at the Time of the Lease, he was of Opinion for the Defendant; for by the Fine the Estate was discharged of the Estate-tail; and the Conusee had a Fee in him, as if Tenant in Tail had died without Issue; and he cited the Case of Sir George Browne and other Cases, and concluded with the Case of Holt and Sambach, 1 Cro. 103. which is exactly the same with this Case; and he gave Judgment for the Defendant.

Lee *versus* Brace. Mich. 8 W. 3.

( 2. )  
3 Salk. 337.  
5 Mod. 266.

A Deed of Feoffment was made to the Use of the Feoffor for Life, Remainder to his Son and his Heirs, and for Want of Issue of him, then to the right Heirs of the Feoffor: Here it was objected, that tho' this would have been an Estate-tail in the Son by a Will; yet the Authorities, which prove it to be so, do likewise make out, that it is otherwise in a Deed.

Holt C. J. This is but one entire Sentence of Limitation, the Intent of which is very plain; and the Rule of Law is only, that an Estate of Inheritance cannot pass without Words of Inheritance; but there is no Rule in Law, that Words of Inheritance may not be qualified or abridged by subsequent Words: Therefore in this Case the Son hath only an Estate-tail, altho' it be by Deed, it being in one Sentence; for tho' the first Words of that Sentence, i. e. To his Son and his Heirs, make a Fee-simple, the Words subsequent, viz. and for Want of Issue of him, make an Estate-tail, by qualifying and abridging the first Words; and in creating Entails, the Will of the Donor is to be observed. By Lord Rolle tells us, if Lands are given to a Man and his Heirs, and if it happen that he dies without Heirs of his Body, Remainder over; this is an Estate-tail, for the Limitation of the Remainder shews what Heirs were intended: And where there was a Conveyance in Way of Feoffment, as this is, to the first Son who should have Issue, and to his Heirs; and for Default of such Issue, the Remainder over to another: Here it was held to be an Estate in Tail. And in the principal Case, the subsequent Words of Limitation shew, that the Feoffor intended no absolute Estate

1 Roll. Abr.  
839.  
Litt. Rep.  
544.  
1 Inst. 21.

state should vest in the Son; it is no more than if a Gift had been made to a Man and his Heirs, viz. to the Heirs of his Body.

Judgment was given for the Defendant.

See Recovery.

## T A X E S.

Brewster *versus* Kidgell. Hill. 9 W. 3.

**I**N this Cause, concerning the Grant of a Rent-charge, to be paid out of Lands without any Deduction or Abatement of Tax, &c. The Question was, whether the Parliamentary Taxes ought to be deducted, or the Rent was payable free of all Taxes, as well Parliamentary as others?

Carthew  
438, 439.  
5 Mod. 368.  
Comb. 466.

Holt C. J. This Rent is payable free of all Taxes; and no Deduction can be made by the Certenant for the Parliamentary Tax of 4s. in the Pound: And the special Reason of this Judgment, and which governs the Case, is grounded upon the Circumstance of Time when the Grant was made, which was Anno 1649, for at that Time those Parliamentary Taxes now in use were first invented; but if this Grant had been in the Year 1640, which was before these Kind of Taxes began, I should have been of another Opinion; because about that Time, and some Time before, the Taxations were by Way of Subsidies, Tenths, and Fifteenths; and it would be hard and unreasonable to extend the Word Taxes to such Impositions, which were not in use at the Time of the Grant. But now our Parliamentary Taxes have a Sort of Existence at all Times, the constant Revenues of the Crown having been found not to be sufficient for the Emergencies of the Government; and therefore these Taxes came in from Time to Time as a Supply: And the King may grant by Patent, that a Man shall be acquitted of a future Tax to be given by Parliament; which shews such Taxes do in some Measure exist; otherwise such a Grant would be void. And although the Land-Tax Act has a Clause, that the Certenant shall deduct the Tax out of the Rent charged thereon, that does not

2 Inst. 76, 77.  
19 H. 4. 62.  
11 H. 4. 33,  
36.  
Bro. Quinz.  
9. c. 30.



repeal or alter the Covenant to pay the same without Deduction. Also the Words of this Grant, viz. to pay the Rent-Charge without any Deduction for Taxes, can have no other Respect particularly but to Parliamentary Taxes; because the Tenant hath no Power to deduct in any other Case whatsoever.

34 H. 8.  
2 inst. 252.

The Word Taxes generally spoken, with Respect to any Freehold, or where the Subject Matter will bear it, shall be intended Parliamentary, and this propter excellentiam; but there are other Taxes, such as for repairing Churches, Rates for the Poor, &c. In the 18th Year of King Ed. 3. a Valuation was made of all the Towns in England, and returned into the Exchequer, and this became the standing Rule for taxing every Town; so that when a Tax was given, the Officers of the Exchequer presently knew to how much it amounted for each Town, and the Inhabitants taxed the Landholders and Occupiers of Lands, and they were charged and paid their Proportion, though they held at a Rack-Rent: The first Subsidy was granted in the 32 Year of H. 8. which was a Tax upon the Person, for his Lands and Goods, and payable by the Party where he lived; and this continued till the 15 Car. 1. But about two Years after that, anno 17 Car. 1. the first Assessment was made upon Lands and Rent, according to a Pound-Rate: And Taxes and Assessments are of the same Nature, for the same Things are taxed by both of them.

32 H. 8. cap.  
50.

Mod. Caf.  
306.

Collectors of the publick Taxes have been adjudged to the Pillory, for assessing some Persons at too high a Rate, and omitting to tax others, where they levied the Tax upon them, and put the Money in their own Pockets.

Taxes and Rates for the Poor, vide Poor.

## T I T H E S.

Bradshaw *versus* Swanton. Mich. 1 W. & M.

**P**rohibition to the Consistory Court of Durham, where the Libel was for Subtraction of Tithes; the Suggestion was, that a verbal Composition was made between the Plaintiff and the Defendant, for all Manner of Tithes for two Years; and the Libel was for Tithes arising within that Time: And a Difference was taken between a Composition for Life, and Years; for in the first Case a Prohibition lies, but not where the Composition is for Life; and to prove this, the Cases in the *Har- gin* were cited.

(1.)  
Carthew  
70.Yelv. 94.  
2 Cro. 137.  
Cro. El. 188,  
249.

To which Holt C. J. answered, and so it was resolved, That though several Books tell us, that a Prohibition would lie where the Composition is for Years; and where the Difference is taken *ut supra*; yet the Law for several Years past hath been clearly taken, that no Prohibition will lie upon any Composition, whether for Life or Years, for any Tithes; and therefore the proper Remedy is to appeal to the Archdeacon, if the Consistory Court should refuse a Plea of Composition.

F. N. B. 43,  
44. 41. G.  
2 Roll. Abr.  
63.  
Litt. Rep.  
155  
Hob. 176.  
2 Cro. 668.  
See Reg 38,  
39.

A Prohibition was denied; quod nota.

Hicks *versus* Woodson. Mich. 6 W. & M.

**G**OLD, King's Serjeant, moved for a Consultation after a Verdict in Prohibition, upon a Custom to be discharged of Tithes of barren Cattle within the Hundred of D. &c. and said, such Custom within an Hundred is not good; though it may be that a Part of a County, as the Weld of Kent, &c. may have such a Custom; as Roll. 654. tit. Dismes. And he insisted, that if such a Custom obtain, the Rectory would be starved; for then the Occupiers and Inhabitants would only feed their Beasts, and never employ them for the Past or Plough. It was answered, that the Custom is found by the Verdict, and so is to be intended to have been so used Time out of Time, and yet the Parson has not been starved. And it was said, that though a

(2.)  
Skin. 360.

Pan

Man may not prescribe in non Decimando, because the Parson has as great Care of his Soul as of the rest of the Parish; yet a Weld, or two Hundreds might, and if two Hundreds, may not one Hundred? For though one or two Ben might combine to defraud the Parson, yet such a general Usage throughout a whole Hundred, or in the greater Part of a County, as a Weld, (and as Holt C. J. thought a whole County) cannot be intended to commence upon a Combination; but to be settled by Usage founded upon Composition or other reasonable Cause.

And Holt C. J. said, that this Case of Tithes, is the only Case in which a Man cannot prescribe for a Discharge.

Eyre J. said, that Tithes for barren Cattle are due by Custom.

But Holt C. J. said, that they are due de communi jure; and two Shillings per Pound is the usual Tithe of Common Right; but that there are divers customary Manners of Tithing for them; and the Custom here was alledged by the Occupiers and Inhabitants.

Curia advisare vult.

### Hill and Vaux. Mich. 10 W. 3.

(3.)  
Cafes W. 3.  
206.  
Salk. 656.  
Carth. 461.

**L**ibel in the Spiritual Court of Lincoln, for Tithe Milk by a Vicar; the Defendant alledged a Modus, and prayed a Prohibition; but it appearing on the Suggestion, that this Modus, during that Part of the Year in which it was payable, gave the Vicar no more than a Tenth, which by the Law he ought to have through the whole Year, nor in a more advantageous Way: The Custom was held void, and a Prohibition denied. In the Debate of this Case a Question arose, whether it had been a good Modus, if it had been alledged that the Delivery had been at the Vicarage-House; which depended on this Question, whether the Parishioner of common Right is obliged to deliver his Milk-Tithes, either at the Vicarage-House or Church-Porch; as was adjudged in the Equity Side of the Exchequer, in the Case of Dod and Engleton, Raym. 277.

And Holt C. J. said, that a Parishioner is not obliged so to do of Common Right, but only to let them out; and that therefore, if this had been in the Modus, it would have made it a good one; and that the Case of Dod and Engleton was a mere equitable Decree, guided by the Custom of the neighbouring Parishes.



Hart *versus* Hall. Mich. 10 W. 3.

**M**otion for a Prohibition to stay a Suit for Tithes of (4.)  
an old Mill, viz. every tenth Coll-Dish, on Suggest- Cases W. 3.  
tion that it was an old Mill. 243.

Holt C. J. The Plaintiff ought in his Suggestion to prescribe in non Decimando, and also to bring an Affidavit of the Truth of the Fact; and so it was adjudged in Lord Chief Justice Hale's Time, in the like Case; for he said, that of Common Right Tithes were not due out of a Mill; yet before the Statute of Articuli Cleri some Mills did pay, and some did not, and upon that it was enacted, that de Molendino de novo erect' non jacet Prohibitio; and for such as paid before that Statute, they shall still pay.

## T O L L S.

Warrington *versus* Mosely. Hill. 6 W. 3.

**T**HE Plaintiff prescribed for Coll of Goods bought (1.)  
within a certain Manor; and the Question upon 4 Mod. 319,  
the Pleadings was, If such a Coll, independent 323.  
of all Markets and Fairs, could be good? It was argued, that the Prescription was unreasonable because the Coll is not for any Goods bought or sold in a Market, &c. And the King cannot impose a Duty upon his Subjects, but such as is for their Benefit; consequently a Lord of a Manor cannot; he might make a particular Agreement with People coming there, but may not exact a Coll.

Holt C. J. & Cur': We are not satisfied with this Prescription, there being no Recompence for it; and every Prescription to charge the Subject with a Duty, must impart a Benefit or Recompence to him, or else some Reason ought to be shewed why a Duty is claimed. The Case in Dyer is very hard, for the Lord Mayor of London to have the twentieth Part of all Salt brought thither, and no Reason given why he should have it. But Colls may be  
8 I good,

2 Roll. Abr.  
171.  
Dyer 352.

good, where they appear to have a reasonable Commencement.

Vinkinstone *versus* Ebdon. Trin. 7 & 9 W. 3.

(2.)  
Carthew  
357, 359.

**I**N Crober, &c. for distraining Things belonging to the Plaintiff's Ship in the Harbour of Newcastle, for a Toll of five Pence for every Chaldron of Coals there shipped off, due by Custom Time out of Kind, to the Corporation, in Consideration of their Charge in maintaining the Port, &c. It was here insisted, that this was a void Custom; and not like the Case of maintaining a Key, which is for the Defence of Ships in Time of Need.

Hill. 25 Car.  
2.

Holt C. J. As to the Reasonableness of the Custom, I hold the Consideration to be sufficient, and that it is a good Custom in Law: Here it is found that the Corporation are bound to repair, &c. the Port; and it is the Obligation which lies on them to do it, and not the Performance of the Thing itself, which is the Consideration of the Duty. In the Case of Malden in Essex, there is a Customary Duty of 10d. out of every Bark of the Purchase Honey of any Borough Lands, payable to the Borough, in Consideration of their Charge in maintaining and cleansing the Port and Haven there; and this was tried at Bar, before the Lord Chief Justice Hale, and adjudged a good Custom.

Judgment for the Defendant.

## T R A D E.

Thompson *versus* Harvey. Trin. 1 W. & M.

(1.)  
Com. 121,  
122.  
1 Show. 2.

**D**EBT on Bond; Part of the Condition was, that the Defendant should not buy Sheep's Trotters of any Person, of whom the Plaintiff had or should buy, &c. On Demurrer,

See 2 Show.  
345, 364.

Holt C. J. held the Bond was void; and said, that in Case of The Taylors of Exeter *versus* Clarke, the Condition of the Bond being not to exercise a Trade in Exeter, was adjudged good; but that Judgment was reversed in the

the Exchequer Chamber on solemn Argument, against the Opinion of Jones C. J.

It is usual to restrain a Lessee from such a Trade in the House let; for I can chuse whether I will let the House, or not.

Dolben J. against the Judgment given in the Exchequer Chamber, in the Case of the Taylors of Exeter. 1 Saund. 311. Denham and Hemlock's Case. A Bond not to use a Trade in such a Street, good.

A Valuable Consideration will make such a Bond good.

Another Part of the Condition was, that he should not buy more than he had done before, which by Eyre is ill, because it restrains him from enlarging his Trade.

The Court was clearly of Opinion, that it tended to a Monopoly, and gave Judgment for the Defendant.

Froth's Case. 10 W. 3. At Surry Assizes.

**H.** Served Seven Years as an Apprentice beyond Sea, (2.) but was not bound. This is sufficient to excuse him from the Penalties of 5 Eliz. Per Holt C. J. at Surry Assizes. 1 Salk. 67.

Holt C. J. at Guildhall: Every Factor of common Right is to sell for ready Money; but if he be a Factor in a Sort of Dealing or Trade, where the Usage is for Factors to sell on Trust, there, if he sells to a Person of good Credit at that Time, who after becomes insolvent, the Factor is discharged; but otherwise, if it be to a Man notoriously discredited at the Time of the Sale. But if there be no such Usage, and he, upon the general Authority to sell, sells upon Trust, let the Vendee be ever so able, the Factor is only chargeable; for in that Case, the Factor having gone beyond his Authority, there is no Contract created between the Vendee and the Factor's Principal; and such Sale is a Conversion in the Factor: And if it be not in Market-overt, no Property is thereby altered, but Trover will also lie against Vendee. So likewise if it be in a Market-overt, and Vendee knows the Factor to sell as Factor.

See Apprentices.



## T R A V E R S E.

Anonymus. Pasch. 9 W. 3.

3 Salk. 357. By Holt C. J.

**A**

Defendant ought to induce his Traveller, for he should not deny the Title of another, till he shew some colourable Title in himself;

1 Vent. 184.

and if the Title traversed be found naught, and no Right appears for him who traversed, it would happen that no Judgment could be given: But an Inducement cannot be traversed, because that would be a Traverse after a Traverse, which would be not only infinite, but absurd. In Trespass for taking and carrying away the Plaintiff's Goods such a Day, the Defendant justifies the Taking the Day following, *quæ est eadem transgressio*; this was adjudged ill upon a Demurrer, because he doth not traverse the Time before and after it.

2 Lutw.

And where a Defendant, in Trespass for entering the Plaintiff's Close, justified by a Prescription to dig for Coals, the Plaintiff replied, *de injuria sua propria absque tali causa*, but did not traverse the Prescription. On a Demurrer to this Replication, it was objected, that the Plaintiff ought to have traversed thus; *absque hoc*, that the Defendant, and all those whose Estate he had in the Premises, have Time out of Mind used to enter into the Close, &c. and to dig for Coals there.

## T R E A S O N.

Patrick Harding's Case. Pasch. 2 W. &amp; M.

(1.)  
2 Vent. 316,  
317.

**U**PON Not Guilty pleaded, the Jury found a Special Verdict, viz. that Patrick Harding, to the Intent to depose the King and Queen, and deprive them of their Royal Dignity, and restore the late King James to the Government of this Kingdom, did

(for Money by the said Patrick paid) list, hire, raise and procure sixteen Men, Subjects of this Kingdom, at the Time and Place in the Indictment mentioned, to fight and wage War against the King and Queen; and those sixteen Men so listed, hired, raised and procured, did send out of this Kingdom into the Kingdom of France, to assist and aid the French King, then and yet an Enemy to the King and Queen, and in open War with their Majesties, and to join themselves with the Enemies and Rebels of and against the King and Queen, in waging War against the King and Queen. And if upon this Matter the said Patrick Harding be guilty of Treason prout the Indictment, then we find him Guilty prout, &c. and if not guilty, &c. then Not Guilty, &c.

Upon this Special Verdict found, Holt C. J. Justice Gregory, and Justice Ventris, who were then present at the Sessions, conceived some Doubt; for they were of Opinion, that it did not come within the Clause of the Statute of 25 E. 3. of levying War; for that Clause is, That if a Man levy War against our Sovereign Lord the King in his Realm. And by the Matter found in the Special Verdict it appears, that these Men were listed and sent beyond Sea, to aid the French King.

It was also doubted, whether it were a good Indictment within the Clause of the Statute of adhering to the King's Enemies. The Fact found in the Verdict comes fully within the Clause, (viz.) the Sending Men to aid the French King, then an Enemy to the King and Queen, in open War against them. But the Indictment is short as to this Matter; for it is, quod milites sic ut præfertur levatos extra hoc regnum Angl' misit ad sese jungend' aliis hostibus, inimicis & rebellat' dict' Regis & Regin'; whereas it should have set forth who the Enemies were, that the Court might take Notice whether they were Enemies as the Law intends. If the Indictment had been, That he sent them to the French King, then in open War, &c. it had been well. 33 H. 6. 1. b.

And upon these Doubts the Case was adjourned for further Consideration.

In Michaelmas Vacation, the greater Part of the Judges were assembled at the Lord Chief Justice's Chambers, and having debated the Matter among themselves, they all (except Justice Dolben) agreed, that the said Patrick Harding was guilty of High Treason, within the Clause of the Statute, for compassing the Death of the King; it being found by the Verdict, that the said Patrick Harding, to the Intent

to depose the King and Queen, and deprive them of their Dignity, &c. did for Money hire, list, &c. and an Intent to depose the King (proved by an overt Act) hath been always taken to be within the Clause of compassing the Death of the King. So is Hale's Pleas of the Crown, fo. 111. and so it was held in the Case of the Earl of Essex in Queen Elizabeth's Time, and the Lord Cobham's Case in the Reign of King James the First.

And Holt C. J. cited the Statute made 29 H. 6. c. 1. upon the Rebellion of Jack Cade; which Act sets forth, that John Cade, naming himself John Mortimer, falsely and traiterously imagined the Death of the King, and the Destruction and Subversion of this Realm, in gathering together and levying a great Number of the King's People, and exciting them to rise against the King, &c. against the Royal Crown and Dignity of the King; was an overt Act of imagining the Death of the King, and made and levied War falsely and traiterously against the King and his Highness, &c. So that it appears by that Act, that it was the Judgment of the Parliament, that Gathering Men together, and Exciting them to rise against the King, was an overt Act of imagining the Death of the King. Vide Stamford's Pleas of the Crown, fo. 180.

And according to this Opinion, Judgment was given against Harding, in the following Sessions, and he was executed thereupon.

Nota; Upon an Appeal to the House of Lords, anno 2 W. & M. the sole Question was, whether upon the Statute of Distribution, 22 & 23 Car. 2. the Half Blood should have an equal Share with the Whole Blood of the personal Estate? And by the Advice of the two Justices, and some other of the Judges, the Decree of the Lords was, That the Half Blood should have an equal Share.

The King and Queen *versus* Tucker. Hill. 4 & 5 W. & M.

(2.)  
4 Mod. 162,  
166.  
3 Lev. 396.

**A**N Indictment for Treason was, that the Defendant and another, not having the Fear of God in their Hearts, nor considering the Duty of their Allegiance, but being seduced, &c. proditorie compassaverunt to kill their supreme and natural Lord; and that they waged War proditorie against the King, their supreme, right, natural and undoubted



doubted Lord, &c. contra pacem, &c. et contra formam Stat. &c. but the Words contra ligeantia suæ debitum were omitted: Upon which, many Exceptions were made to the Indictment; for that the Conclusion of an Indictment is material, and goes to all, and here are no Words to supply the Defect of those left out; the Word proditorie will not do it, because a Person may be treacherous, and not act against his Allegiance, &c.

Holt C. J. & Cur': The Want of concluding the Indictment with these Words, contra Ligeantia suæ debitum, is erroneous; and such an Omission will make it so, though there are Words in the Body of the Indictment which tantamount; for a Man may levy War, as an Alien Enemy, and not be guilty of the Offence as laid here; and that was the Reason in Calvin's Case, why that Indictment was not concluded contra Ligeantia debitum: But it is otherwise in this Case, and here the Indictment hath not any Words that will supply this Omission; for debitum Ligeantia suæ minime ponderans cannot do it, by Reason a Man may not consider the Duty of his Allegiance, and yet do nothing which is contrary thereunto. Then contra dominum Regem supremum, verum & naturalem dominum suum, &c. will not help it, because those Words are not always essential in an Indictment, they signify no more than to shew that the Offender was born in England; they are Words superabundant, and have been added to Indictments in later Times; for the old Way was, to set forth the Offence to be contra dominum Regem only; so that Words, which are not necessary in an Indictment, shall never be construed to supply the Omission of those which are absolutely necessary. The very Offence of Treason is because it is committed contra Ligeantia debitum; the other Words are but an Aggravation of the Offence, and the Omission of that Clause can no more be supplied by the Word Proditorie, than Felonice in Indictment of Felony could supply contra pacem: And it would be very strange, if the omitting contra pacem in an Indictment at the Common Law, and contra formam Statuti for an Offence done against a particular Statute, should be Error; and yet an Omission of these Words should be none. It is true, there are several Indictments in the Reign of R. Henry 8. against Offenders for High Treason, which was made so by some new Statutes in those Days, as denying his Supremacy, &c. in which these Words were omitted; but the Reason was, because they were new Treasons created by parti-

1 Inst. 129.  
7 Rep. 6, 11.  
Hob. 271.  
Standf. P. C.  
96.  
Cro. Car.  
120.

particular Acts of Parliament; and it is probable the Proceedings in those Cases begat this Error.

Judgment was reversed, and Reversal affirmed in Parliament.

### Walcot's Case. Hill. 6 W. & M.

( 3. )  
4 Mod. 395,  
399, 401,  
402.  
Cas. in Parl.  
127.

**I**N this Case, on a Writ of Error brought for a Defect in the Judgment itself for committing Treason, it was assigned for Error, that the Judgment was quod interiora sua extra ventrem suum capiantur, omitting ipsoque vivente comburentur: And these Words were insisted upon to be very essential in Judgments for Treason.

Smith's Rep.  
Angl. 245.  
Finch 28.  
12 H. 8. 13.  
Yelv. 107.  
1 H. 4. 1.  
Co. Entr.  
699.  
S. P. C. 182.

Holt C. J. and Court held, that as Treason is the greatest Crime, so it deserves the greatest Punishment; and though Death is ultimum supplicium, yet that is the Punishment for Felony, which is an Offence of a less Nature; therefore Treason should be punished not only cum ultimo supplicio, but with an Aggravation of the corporal Pain, because it is a Crime committed against the Body Politick, in the Person of the King, who is the Head of the Kingdom, and of whose Preservation the Law takes so great Care, that it punisheth the very Intention to commit Treason against him; but no Man can be guilty of Felony without an Act done: And when the Law of England appoints a particular Judgment for an Offence, as this is appointed by the Common Law, it is not in the Power of the Judges to alter it, either by any Addition or Diminution. The giving of Judgment against Malefactors is Part of the Constitution of the Government, and therefore it cannot be discretionary, which is but a softer Word for arbitrary; and if it were so, then the Courts which give Judgments might make new Punishments, as they should think more suitable to the Crimes; for they might pronounce a Turkish Judgment, viz. that the Offender should be strangled; or Jewish Judgment, that he should be stoned to Death; or a French Judgment, that he should be broke on the Wheel; all which are contrary to the known Laws of this Realm. This being then an essential Part of the Judgment, settled and stated by the Common Law of England, the Omission of these Words makes it void: And if this Omission in the most severe Part of the Judgment, should not be Error, then those Judgments which have these Words cannot be supported, because a heavier Punishment is by that Means in-

fixed on the Subject than allowed by Law, and for that Reason may be reversed: Therefore it must of Consequence be, that these Words are a necessary Part of the Judgment in High Treason, and the omitting of them makes it erroneous.

The Attainder was reversed.

*Charnock's Case.* March 11. 8 W. 3.

Holt C. J. **I**n directing the Jury said, It was very true, (4.)  
 as Mr. Charnock had observed, that bare State Trials.  
 Words were not Treason, in some Cases; loose Words spoken without any Relation to any Act or Design, were not Treason, or an overt Act of it; but Arguments and Words of Persuasion to engage another in such a Design or Resolution, and directing or proposing Means to effect it, were overt Acts of High Treason. It was the Imagination, the Compassing and Designing the Death of the King, that was the Treason; there was no Way of discovering those Compassings and Imaginations, but by some external Act, that manifested such Intention or Purpose; and any Thing, that was a Manifestation of such a Design, was an overt Act. And here had been proved several Meetings and Consultations, and Proposals at those Meetings, about the Ways and Methods of bringing about the Design of Assassination; and it was never yet doubted, but to meet and consult to kill the King, was an overt Act of High Treason, and Mr. Charnock's endeavouring to engage Bertram in the Enterprize, was another overt Act.

As to the Objection to the Credibility of the Witnesses, that they had acknowledged themselves involved in the same Crimes; they were however legal Witnesses, but their Credit in this, as in all other Cases, was left to the Jury. That such Evidence had been always allowed; and unless the Accomplices were admitted to be Witnesses, Governments could never be secure against such villainous Enterprizes.

*Sir John Friend's Case.* 23 March 8 W. 3.

**S**IR John insisted, that a Consultation to levy War was (5.)  
 not Treason, and that the being at a treasonable Coun- State Trials.  
 sult, was but Disposition of Treason; and thereupon the



Statute of 25 Ed. 3. was read; but these Points were over-ruled against him.

And Holt C. J. in summing up the Evidence observed, that this Statute contained divers Species, as 1<sup>st</sup>, the Compassing the Death of the King; and 2<sup>dly</sup>, Levying War; but a bare Conspiracy or Design to levy War, was not within this Law against Treason. But if the Design or Conspiracy be either to kill the King, or to depose or imprison him, or to put any Force or Restraint upon him, and the Way proposed to effect any of these is by levying War, there the Consultation and Conspiracy to levy War is High Treason, though no War be actually levied. For such Consultations and Conspiracies are Overt Acts, proving the Designing or Compassing the Death of the King, which was the first Treason specified in the Statute of 25 Ed. 3. That where a Man designed the Death, Deposition, or Destruction of the King, and, pursuant to that Design, agreed and consulted to levy War, that this should not be High Treason, unless a War was actually levied, this was a very strange Doctrine. A War may be levied indeed without any Design against the King's Person, which, if actually levied however, is High Treason; but a bare Design to levy such a War was not Treason. As for Example; the Rising in Arms to pull down all Enclosures; to expel Strangers; or to pull down Bawdy-Houses, without Authority, was Levying War and Treason: But the bare Purposing and Designing to rise in Arms for such Purposes, was not Treason. If Persons assembled themselves also, and acted with Force, in Opposition to some particular Law which they thought inconvenient, and hoped thereby to get it repealed, this was Levying War, and Treason; but the Purposing and Designing it was not so. When Men endeavoured in great Numbers with Force to procure some Reformation in the Church or State, without pursuing the Methods of Law, that was a Levying War, and Treason within the Statute; but the Purposing and Designing it was not so. But if there was a Purpose to destroy the King, to depose him from his Throne, to restrain him (in the Exercise of his Power) or to put any Force upon him; and it was proposed or designed to effect any of these by War, such a Conspiracy or Consultation to levy War, for bringing any such Design to pass, was an Overt Act of High Treason.

Sir William Perkins's *Case*. 24 March 8 W. 3:

**H**OLT Chief Justice (among other Things) observed, (6.)  
 as to the Prisoner's Objection, That Sweet proved State Trials.  
 only Words, and Words were not Treason: These were  
 Words that related to Things, and Mens Discourses and  
 Words explained their Actions; an Action indifferent in it  
 self might be so explained by Words, as to be unlawful.  
 It was lawful for a Man to buy a Pistol; but if it could  
 be plainly proved from his own Words or Speeches, that  
 the Design of buying it was to use it against the Person or  
 Life of the King; that would make it an Overt Act, or a  
 Manifestation of a treasonable Design: And therefore when  
 Sir William Perkins said that the late King would come,  
 that he had a Troop that consisted of old Soldiers, and  
 these Arms were provided in this manner; there was ample  
 Proof for what Purpose he had provided them. It was not  
 at all probable he found them in his House; and his going  
 into the West, and declaring at his Return, that the West  
 were as well inclin'd to the King's Interest as the North;  
 (if by the King he meant King James) was another Evi-  
 dence of his Guilt.

Mr. Rookwood. 21 April 8 W. 3.

**T**HE Prisoner being arraigned, and pleading Not guilty, (7.)  
 was ordered to be brought into Court again that State Trials.  
 Day seven-night; and he appeared at the Bar with the  
 Counsel that had been assigned him, in Pursuance of the  
 late Act, viz. Sir Bartholomew Shower, and M<sup>r</sup>. Phipps,  
 on the 28th of April.

The Prisoner's Counsel objected, That there being a  
 Clause in the late Act, That the Prisoner shall have a Copy  
 of the Panel of the Jurors who were to try him, duly re-  
 turned by the Sheriffs, two Days before the Trial, the Return  
 must be antecedent to his having a Copy. That they had  
 indeed a Copy of the Array of the Panel delivered them,  
 but that was not a Copy of the Panel returned; for it  
 was no Return till it came into Court.

But the Court ruled, that the giving a Copy of the  
 Panel before the Return, sufficiently satisfied the Words,  
 as

as well as the Intention of the A<sup>t</sup>; and that no other Constrution could be made without great Absurdities.

Another Objection made by the Prisoner's Counsel was, That they had not a true Copy of the whole Indictment delivered them, as the late A<sup>t</sup> required; for that it did not appear before whom it was taken, the Time when, or the Place where.

The Attorney General answered, This Objection came too late, they had admitted it to be a true Copy by pleading to it; and of that Opinion were the Court.

The Panel being called over, the Prisoner challenged Thirty-four peremptorily; after which a Jury was sworn, and charged with the Prisoner.

Then his Counsel moved, that they might offer their Exceptions to the Indictment before Evidence given, according to the Words of the late A<sup>t</sup> of Parliament.

The Court answered, They were too late; they ought to have moved this upon the Arraignment before Plea pleaded, or at least before the Jury were sworn and charged with the Prisoner: For after they were once charged in Case of Treason, they must give a Verdict, and either acquit or convict him.

That the Design of the Parliament was to restrain the Prisoner from moving in Arrest of Judgment, for mispelling, false Latin, or little Matters of Form, if he did not move it in a proper Time; having such a Liberty allow'd him as to have a Copy of the Indictment so many Days before he was compelled to plead. That altho' the Words of the A<sup>t</sup> were, before Evidence given, it was nevertheless intended that they should move at such a Time before Evidence given, as the Law allowed; and that the A<sup>t</sup> did not establish any new Method of Trial.

However, it was proposed by the Court to the King's Counsel, That since it was a new A<sup>t</sup> of Parliament, and the Prisoner might be led into this Mistake by the Penning of the A<sup>t</sup>, they should not take Advantage of his having lapsed, but indulge him so far as to let him offer his Exceptions now.

To this H<sup>r</sup>. Attorney consented, provided they would confine themselves to such Heads as were mentioned in that Clause of the A<sup>t</sup> which only related to Matters of Form, and not offer any Thing to the substantial Part of the Indictment, which they had still a Liberty of doing in Arrest of Judgment.



But the Counsel for the Prisoner refused to offer any Thing, unless they might urge all their Exceptions together.

Mr. Porter being called to give Evidence, the Prisoner's Counsel opposed the swearing him, because he stood convicted of Felony, and was not capable of being a Witness; and the Record of his Conviction was read, and the Prisoner's Counsel insisted, that though he had the King's Pardon, that would not restore him to his Credit, so as to make him capable of being a Witness.

But the Court held, that the King's Pardon was as effectual as a Parliament Pardon; and either of them, before Attainder (as their Case was) prevented all Corruption of Blood; so that though a Man forfeited his Goods by Conviction, yet after a Pardon, he is capable of having new Goods, and shall hold them without any Forfeiture forever; for the Pardon restores him to his former Capacity, and prevents any further Forfeiture: Indeed if he had been attainted, (condemned or outlawed) whereby his Blood would have been corrupted, no Pardon, whether it were by the King, or by the Parliament, could purge his Blood, without a Reversal of the Attainder by Writ of Error, or Act of Parliament, or express Words in the Act, restoring him to Blood: The Conviction indeed might be objected to his Credit, but could not be urged against his being a Witness.

Rookwood objected on the Evidence, That the List given to Harris, one of the Witnesses, was not mentioned in the Indictment; but the List in the Indictment referred to Mr. Cranborne.

The Chief Justice answered, That this List of Men given to Harris was an Evidence of the Consent and Agreement of Mr. Rookwood to command the Party.

To which the Prisoner's Counsel replied, That by the Words of the late Act, no Overt Act could be given in Evidence, that was not expressly laid in the Indictment; and they had charged in the Indictment, that Cranborne had carried a List backward and forward as an Overt Act of the Treason; which shewed the King's Counsel thought it necessary to be alledged, by this Act of Parliament, or they could give no Evidence of it. But the List they gave Evidence of here, was the List supposed to be delivered by the Prisoner to Harris, which was no Evidence of the List alledged to be carried about by Cranborne: And as this List given to

Harris was not mentioned in the Indictment, no Evidence could be given of it.

The Chief Justice said, Although the Aa did exclude the giving Evidence of an Overt Aa that was not laid in the Indictment, yet it did not exclude such Evidence as was proper to prove that Overt Aa that was laid in the Indictment; therefore the Question was, whether the giving this List to Harris did not prove some Overt Aa that was alleged in the Indictment. There was laid in the Indictment an Agreement to kill the King; and if that was proved, that was an Overt Aa of this Treason. And when the Agreement to that Design was proved, there was no Doubt but his giving a List of the Men, who were to be Assassins in it, to Harris, was a further Proof that he did agree to it; and then it was very proper to be given in Evidence: For, if by the new Statute, no one Aa could be given in Evidence to prove another; then not only the Overt Aa, but also all the Evidence of that Aa must be expressed in the Indictment.

Concluding, That if the Jury did in the first Place believe that there were such Consults and Meetings, where the intended Assassination of the King was debated and resolved on; and that Mr. Rookwood was present, and did agree to it; that was an Overt Aa. And again, If they were satisfied that there was an Agreement to prepare, and produce a Number of Men to set upon the King and his Guards in the Manner they had heard, and the Prisoner was concerned in making this Provision, and was to have a Post, and command a Party in that Attack; that was a further Proof of that Consent and Agreement, that was laid in the Indictment.

He was convicted and executed.

Trial of Charles Cranborne. 21 April 1696.

(8.)  
State Trials.

**T**HE Prisoner's Counsel took several Exceptions to the Indictment; as that it is said Anno Regni dicti Domini Regis nunc septimo, and Lewis was the last King mentioned. To which it was answered, that Dominus Rex must be understood of the King of England. 2. That it was said diversis diebus & vicibus tam antea quam postea; and afterwards says, postea scilicet eodem decimo die Februarii, which was repugnant. To which it was answered, that postea was another Sentence, and related to different Matters.

ters. 3. That this Indiament being against a Subject born, ought to have had the Words, contra Supremum naturalem Ligeum Dominum suum.

The Chief Justice answered, he had seen Abundance of Precedents, that had only the Words contra Legiantiam suam debitum: That Allegiance was the Genus, and if that was suggested, all the Species of Allegiance, whether natural or local, were comprehended in it.

4. It was objected, That one of the Overt Acts was not laid to have been done traitorously, it being only said, consenserunt, agreeaverunt & assenserunt, quod quadraginta homines, &c. The Chief Justice answered, That after they had laid the Word Preditorie as to the particular Treason, it was not necessary to lay it again to the Overt Act; for the Overt Act was but the Evidence of the Treason, the Treason itself lay in the Compassing, which was an Act of the Mind.

5. That it did not appear any of the Overt Acts were the Presentment of the Jury: In reciting the Overt Acts, they ought to have begun again with a Quodque, or something that should have referred to the first Juratores presentant; or else they should have begun quite again with a Juratores ulterius presentant; and not have coupled them, as this was, with an Et. To this the Chief Justice answered, That the High Treason charged in the Indiament was but one and the same Offence; the other Facts mentioned were but Overt Acts to manifest this Treason, (viz.) the Compassing the Death of the King; and therefore he thought the Form of the Indiament better as it was, than if it had been otherwise.

Then the Prisoner's Counsel moved, That those, who were upon the last Jury, might not be called upon this, because they had given a Verdict upon the same Indiament, and therefore could not be so indifferent as the Law intended they should be.

The Court answered, Though it was upon the same Indiament, the Evidence was not the same; for they were distinct Offences.

He was convicted and executed.



Trial of Robert Lowick, 22 April 1696.

(9.)  
State Trials.

**T**HE Prisoner being arraigned, his Counsel objected, That the Time and Place were not ascertained in every Overt Act that was laid in the Indictment. The Time and Place, when, and where they met, and discoursed of the Ways and Means to kill the King, indeed were mentioned; but when they came to the Assenserunt, Conenserunt, and Agreaverunt, which were other Acts, they had neither ascertained Time or Place; and they insisted, that the Court ought not to permit them to give Evidence therefore of this Part of the Indictment, which was vicious. The Chief Justice answered, The Indictment said they met such a Day at St. Paul's Covent Garden, and consulted to kill the King; and consented and agreed that it should be done in this Manner, which must refer both to the Time and Place mentioned in the Beginning of the Indictment; and they might give Evidence of it, because that this was but a setting forth the Manner agreed upon for the Execution of the Design, which was before consulted of: And if it had been omitted, there would have been a sufficient Overt Act alledged to prove the Compassing the King's Death. For if People meet at such a Time and Place, and propose Means to effect this, the Indictment would be good without laying the particular Means agreed on; and they might give this in Evidence as a Proof of that Overt Act.

The Chief Justice in summing up the Evidence observed, that two Witnesses were not necessary to every Overt Act; but one Witness to one, and another to another Overt Act was sufficient. That they ought not indeed to put any forced and violent Constructions upon Words in Cases of Life; but if the Evidence was plain and clear, though the Prisoner did not say in express Words he designed to assassinate his Majesty; yet if upon the whole of the Discourse that passed between Bertram and the Prisoner, it appeared plainly and satisfactorily to them, that he did consent and agree to this Design, or was engaged in it; then Bertram was another Witness to prove him guilty besides Harris, which was as much as the Law required.

He was convicted and executed.

Trial of Thomas Vaughan. 6 November 1696.

**T**HE Prisoner being brought to his Trial, and com-  
 plaining of his Irons, the Chief Justice order'd them  
 to be knock'd off, that he might stand at Ease whilst he  
 made his Defence; after which he pleaded Not guilty:  
 Then his Counsel, Mr. Phipps, being about to make some  
 Exceptions to the Indictment, the Court told him he ought  
 to have excepted to the Indictment before the Prisoner had  
 pleaded; for it was not the Intent of the late Act to alter  
 the Method of Proceeding; however he might move in Arrest  
 of Judgment, if he had any material Exceptions to make.

(10.)  
 State Trials.

The Prisoner then desiring, that the Witnesses might be  
 examined apart, out of the hearing of each other, the Court  
 granted his Request as a Favour, but told him he could  
 not demand it as his Right.

Edmund Courtney, Witness, was called to prove that  
 Vaughan, the Prisoner, run away to France with a Custom-  
 house Boat: But his Counsel objected to this Evidence,  
 because the Fact was not mentioned in the Indictment; for,  
 by the late Act of regulating Trials of Treason, no Evi-  
 dence was to be admitted of an Overt Act, not expressly  
 laid in the Indictment.

So which the King's Counsel answered, That in an In-  
 dictment for compassing the King's Death, indeed the Overt  
 Acts must be laid, because the Compassing or Conspiring the  
 King's Death could not be discovered but by such Overt  
 Acts. But levying War, and adhering to the King's En-  
 emies, were Overt Acts of themselves, and needed no other  
 Acts to manifest them.

Whereupon the Chief Justice Holt declared his Opinion,  
 That an Indictment for levying War, or adhering to the  
 King's Enemies generally, was not good, unless it was  
 alleged in what manner the Party levied War, or ad-  
 hered to the King's Enemies. And if they did express in  
 what manner he levied War, or adhered to them, no Evi-  
 dence ought to be given of any other kind of War, or Ad-  
 herence, that was not specified in the Indictment; if it did  
 not tend to prove some Fact that was specially laid in it.  
 They could not give Evidence of a distinct Act which had  
 no Relation to the Overt Act laid in the Indictment.

Samuel Oldham, another of the Crew belonging to the  
 Ship Coventry, confirmed the Testimony of the former

Witnesses; but said there was a Dozen Foreigners taken on board the Clancarty, whether French or Dutch he could not tell, because he could not speak either.

Hereupon the Chief Justice observed, If they were all Dutchmen, and appeared in a hostile manner against the King of England's Subjects, they were to be deemed Enemies, though their State was in League with ours.

The Prisoner's Counsel replied, In the Indisment they are called Subditi Gallici, French Subjects; which they could not be by any Construction. But the Court said, the French King's Commission prevented their being Pirates, and by Virtue of that Commission they might be termed his Subjects, with respect to any other State but their own, though they were not Frenchmen, they were Gallici Subditi, being in the French King's Service.

And afterwards, in his Charge to the Jury, observed, That the Prisoner having this Commission to be Commander of this Vessel, though they that served under him were not Native Frenchmen, but other Foreigners; yet their subjecting themselves to him, acting by Virtue or Colour of that Commission, makes them to be the French King's Subjects during their Continuance in their Service, for otherwise all Prizes which they should take would make them to be Pirates; which none will pretend to maintain, when they acted by a Commission from a Sovereign Prince that was an Enemy. And if they shall cruise upon our Coasts, with a Design to take or destroy any of the King's, or his Subjects Ships, they are Enemies; though they were the Subjects of a Prince or State in Amity with the King of England. But at this Time there is no Necessity of entering upon this Question, because it is proved, that diverse who were on board this Vessel were Frenchmen; the joining with whom in Prosecution of such a Design, is that kind of High Treason of adhering to the King's Enemies. So that if Captain Vaughan was a Subject of England, he is proved guilty of High Treason, if the Jury believed the Evidence.

He proceeded; You are therefore to consider the Evidence on both sides: The Question principally is, Whether the Prisoner be a Subject of England? If you are satisfied that he is not an English Subject, but a Frenchman; then he is not guilty of this High Treason. But if you are satisfied by the Series of the whole Evidence, that he is an Irishman, and that he had a Commission from the French King; and that he cruised upon our English Coasts in Company with  
the



the King's Enemies, with a Design to take, burn, or destroy any one of the King's, or his Subjects Ships; you are to find him guilty of the High Treason, whereof he stands indicted, otherwise you are to acquit him.

The Jury being withdrawn, after a short Time they returned into Court with their Verdict, that the Prisoner was Guilty.

And it being demanded what he could say why Judgment should not pass upon him, he answered, he referred himself to his Counsel: Whereupon Mr Phipps objected, That the Treason of adhering to the King's Enemies was not well laid in the Indictment, for it did not say the Prisoner adhered to the King's Enemies against the King; and possibly he might join with the King's Enemies against Holland and Spain. To which the Court answered, That the adhering to the King's Enemies against his Allies, was an encouraging them, and enabling them to do Mischief to the King. That the 25 Ed. 3. defined the Treason to be in adhering to the King's Enemies, and expressed the Overt Act to be giving them Aid or Comfort. It was sufficient to alledge the Treason in the Words of the Statute, Adhering to the King's Enemies: And if the Overt Act alledged, shewed it to be against the King, and in Pursuance of his Adherence, that was sufficient. Mr. Phipps replied, That the Indictment only said, he went a cruising; whereas they ought to have alledged some Act of Hostility. But the Court over-ruled that Objection, and said, that the Cruising upon the Coast with an armed Vessel, was an Hostile Act; and that their going on board, and putting themselves in a Posture to attack the King's Ships, was an actual Levying a War.

Sentence was passed on him as a Traitor, and he was executed.

The Arraignment of James Boucher. 28 Feb.  
2 Ann.

**T**HE Indictment charged him with High Treason, in going to France and returning to England again, without License, contrary to the Statute of 9 W. 3. (11.) State Trials.

The Prisoner confessed the Fact, pleaded Guilty, and threw himself upon the Queen's Mercy; but was told he must apply himself elsewhere for her Majesty's Pardon.

And

And Holt C. J. proceeded to pronounce Sentence of Death upon him as a Traitor, after he had made the following Speech upon the Occasion, viz.

Mr. Boucher, you are by your own Confession convicted of High Treason, for which Judgment of Death is to be pronounced upon you, and which you are to suffer under those Circumstances which the Law hath appointed.

The Fact of which you were accused, and have now confessed, is, that since the 11th Day of December 1688, you went into France without License, either from the late King or Queen, and have returned since the 14th of January 1697, without any License under the Privy Seal, either from the late King, or her Majesty that now is; which Fact is made High Treason by the Statute of the ninth Year of the late King.

The Wisdom and Justice in making that Law will be very evident, to any one that will but reflect upon the Posture of our Affairs at that Time. For in the Year preceding that of the making thereof, there was an horrid Conspiracy formed among that Party of Men who had so left the Kingdom, to assassinate the late King, to introduce a Popish and French Power, for the Subversion of the Protestant Religion, and the Liberties and Properties of the People of England; which was managed with that Privacy, and carried on with that Secrecy, that it was not discovered, nay, not so much as suspected, until it arrived to that Maturity, that it was come to the very Point of being put in Execution.

The Truth of which is very clear, as well by the Proofs produced by the Trials of several of the Malefactors, as by their own Confession.

In the following Year the Peace of Ryswick was made, whereby the Intercourse was restored between England and France; from thence it was evident, that divers of that Party of Men would return into the Realm, thereby to have an Opportunity to revive and carry on that horrid Design, in the Success whereof they had been so disappointed, for which, no doubt, they were not a little enraged; and it could not be otherwise expected, but they would make use of it, for those of the same Principles will be guilty of the same Practices.

Therefore it was necessary to make a Returning into England, by any of those who were under these Circumstances, to be so very penal, unless they should first give Satisfaction to the Government, either of their Innocence or

Repentance, and obtain a License and Approbation for their Return under the Privy Seal. For their Returning in any other Manner, is a Danger to the Queen's Person and her Kingdom.

This Treason, though it seems and is new in the Form, yet it is compounded of an old Treason, known in the ancient Law of the Kingdom, which is that of Adhering to the King's Enemies. For what can be thought of those, who in Time of War shall abandon their own Country, and be harboured and protected in an Enemy's Country, for being of an Interest inconsistent with, and even repugnant to that of their own?

What your Design might be in returning in this Manner, whether to revive and pursue those wicked Practices, your own Conscience is your Witness, and will be your Judge; and if that shall acquit you, it will be for your Advantage in the World to come. But you are an Offender against the Law of the Land, which has made this your Offence to be High Treason, and therefore that Judgment appointed for one guilty thereof, must be pronounced. And it was pronounced accordingly; but Boucher was reprieved, and afterwards pardoned.

### Trial of David Lindsay. 19 April 1704.

**D**avid Lindsay was indicted, for that he being a Subject (12.)  
of the late King William, and now a Subject of her State Trials.  
present Majesty, after the 11th Day of December 1688, viz. the 26th of March 1689, was in the Kingdom of England, at the Parish of St. Martin in the Fields in the County of Middlesex, and afterwards, and before the 3d of December 1697, viz. the 1st of October 1696, he the said David Lindsay did voluntarily go into France, without License from the late King William, or the late Queen Mary, and that he the said David Lindsay on the said 3d Day of December 1697, was not within the Dominions of the late King William, and that he the said David Lindsay, not having the Fear of God in his Heart, nor weighing the Duty of his Allegiance towards our Lady the Queen, that is his supreme, true, legitimate, lawful and undoubted Lady, and as a false Traitor to our said Lady Anne, the Queen that now is, after the 14th Day of January 1697, viz. the 10th of December in the second Year of the Reign of our Lady the Queen, did traitorously return and come into the Kingdom of England,  
8 O viz.



viz. at the Parish of St. Martin in the Fields in the County of Middlesex, without License from the late King William, under his Privy Seal, or from our said Lady the Queen, under her Privy Seal obtained, against the Duty of his Allegiance, and against the Form of the Statute, and against the Peace of our Lady the Queen, her Crown and Dignity, &c.

Holt C. J. You urge that you are a Subject of Scotland, and so not within this Act of Parliament. But you ought to consider, that as you are a Subject of Scotland, so also you are a Subject to the Crown of England, by being a Native of Scotland, since the Accession of Scotland to England, which is by the Law of England. And if the Case had been, that you had only departed from Scotland into France, and from thence returned into Scotland, and stayed there, without ever coming into England, the Case would have been different; for it may be the Law of England cannot oblige a Scotchman, for any Act by him done in his own Country; (though there is no Occasion to give any Opinion of that) but an Act of Parliament in England may subject any Scotchman to any Penalty, for any Act that he should do in England. Suppose a Scotchman going out of Scotland into France, since the 11th of December 1688, that shall return into England since the 14th of January 1697, he seems to be within the Words and Meaning of the Act. But there is no need of determining that Point now. The Prisoner being a Scotchman born, and having been in England for a long Time, and departing from England into France within that Time, and returning into England afterwards, is to all the Purposes within the Letter and Design of the Act: For being a Resident in England at that Time, you are to all Purposes a Subject of the Crown of England, as much as any Native of England; and your Departing into France, and Remaining there for so long Time, and Returning without License, is the same Danger that the Act of Parliament intended to prevent.

Mr. Williams: My Lord, I would not presume to say any Thing in Derogation of Calvin's Case. But I say, that though a Scotchman may be as a natural-born Subject of England, yet he may not be within the Meaning of this so penal a Law.

Holt C. J. Certainly within the Meaning, if within the Words and Reason. But there is another Point which your Counsel have urged in his Behalf, which is, that this Pardon is a License to him to return into Scotland, which in

Truth is not, for it is to another Purpose, viz. to pardon and discharge all Treasons and Crimes committed in Scotland, but not to give a License to return into that Realm. But suppose it be a License to go into Scotland, that will not be a License to return into England. The Treason is to return into the Realm of England, or any other his Majesty's Dominions. Another Matter that you have insisted upon is, that supposing this to be a good Pardon under the Great Seal of Scotland, it hath pardoned the Offence of going into France. The Return into England cannot be High Treason, because the Treason consists of two Facts, say you, which are, the Departing into France, and the Returning into the Queen's Dominions. Like unto the Case when one gives another a mortal Wound of which he languishes, and before he dies the Stroke is pardoned, and then the Party dies; afterwards it will not be Murder, because that Act which should make it so, is discharged by the Pardon. To this a plain Answer hath been before given by the Queen's Counsel, that going into France since the 11th of December 1688, is no Offence originally, but only the Return of such Persons is made High Treason, and from that Return doth the High Treason commence. Therefore such a Pardon under the Great Seal of England could not have discharged him from being guilty of High Treason, if he had returned afterwards.

But says he for himself, (as I apprehended him) that this Pardon hath made him a free Scotchman, to all Purposes, as if he had never offended; and though the Pardon cannot have any Operation to discharge him of any Crime committed against the Law of England, yet it hath this Effect, by putting him in the same State of other Scotchmen, to enable him to come into England. It is true, this Pardon puts him in the same Condition in which other Scotchmen are by the Law of Scotland, but it puts him not in the same Condition that other Scotchmen are by the Law of England. By the Law of England, Scotchmen may at any Time come into England; but the Law prohibits those who are Subjects, and went into France without License, to return into England.

They who are born in Scotland may inherit Lands in England; but if an Alien to England and Scotland be naturalized by Act of Parliament in Scotland, though he is to all Purposes a natural-born Subject of Scotland, by the Laws of that Realm, yet not therefore inheritable to Lands in England,

land, because he is not a natural-born Subject by the Law of England.

There is another Question hath been stirred, which is, that he should have been indicted in the first English County into which he came; for it appears upon the Evidence that he came from Scotland; now Middlesex cannot be the first County, but it must be Northumberland; for upon his Coming there, the Treason is compleat. And his Proceeding further into other Counties, cannot make it more Treason than it was before. As to the Case of Felony, stealing Goods in one County, and carrying them into another, it is Felony in every County they are carried into. A Prisoner escapes from a Gaol in one County, and then goes into several Counties, it is an Escape into every County in which he comes; which is a Case very apposite to this Question. Suppose a Man committed for Felony has escaped out of Newgate into Northumberland, may he not be indicted in Northumberland? He came voluntarily into this County of Middlesex, and certainly he may be indicted and tried here. Indeed, if he had been taken in one County, and carried into another County, that would be another Case, because he came there by Coercion.

## T R E S P A S S.

Horner *versus* Bridges. Pasch. 4 W. & M.

(1.)  
Com. 193.

**T**RESPASS Quare clausum fregit, and pulled down a Wall, 2 April 2 W. & M. with a Continuando to the 20 February 1 W. & M. On Not Guilty pleaded, there was a Verdict for the Plaintiff, and entire Damages assessed. It was now moved in Arrest of Judgment, that the Continuando is laid before the Trespass.

Ch. J. and Eyre: That the Continuando is void, because it is impossible, and the Damages shall be intended for the Trespass only.



King & Ux' *versus* Peppard. Mich. 5 W. & M.

**A**ssault and Battery upon the Plaintiff's Wife; the Defendant pleads Son assault demesne; the Plaintiff replies, that the Defendant entered the Plaintiff's House, and abused the Husband; whereupon the Wife, Tempore quo, &c. Molliter manus imposuit, without any Traverse or Averment, quæ est eadem, &c. (2.) Com. 227.

For the Defendant it was said, there ought to be a Traverse, as in Rastal 612. (12) Old Entries. 1 Cro. 164. Durscomb and Smith's Case; and it may be averred quæ quidem mollis impositio, &c. est eadem, &c.

Holt C. J. That would be a very insipid Averment, when the Defendant pleads Son assault demesne generally; non constat to the Court, whether that Assault were justifiable or not? Then the Plaintiff by the Replication shews it was a justifiable Assault, and so confesseth and avoids, which is a full Answer without a Traverse: Where the Replication is de injuria sua propria, it must conclude ad patriam. Here the Laying on of Hands is a Beating, and if the Plaintiff had given the Defendant a Box of the Ear, that might have been shewed in the Rejoinder; and where the Parties agreed in the Time (as here tempore quo) there needs no Averment that it is the same Trespass. 21 H. 7. Judicium pro Quer'.

Monkton *versus* Pashley. Hill. 1 Ann.

**T**respass for entering his Close, and Hunting such a Day, continuando transgres. præd. quoad the Hunting, diversis diebus & vicibus from the Day of the Trespass alledged till such a Day. (3.) 2 Salk. 638. S. C. 6 Mod. 38.

Holt C. J. held, That of Acts that terminate in themselves, and once done cannot be done again, there can be no Continuando, as Hunting and killing a Hare, or five Hares, but that ought to be alledged, That Diversis diebus & vicibus inter such a Day and such a Day he killed five Hares. And where a Trespass is laid in Continuance, that cannot be continued, Exception ought to be taken at the Trial, for he ought to recover but for one Trespass.

Comb. 193.  
377, 427, 433.  
Farell. 152.  
5 Mod. 178.

The Court held that Hunting might be continued, as well as Spoiling and Consuming his Grass.

The Plaintiff had Judgment.

Brook *versus* Bishop. Hill. 1 Ann.

(4.)  
3 Salk. 359.  
Comber. 426.

**A**ction of Trespals was brought, quare vi & armis the Defendant on the 2d of April broke and entered the Plaintiff's Close, and trod down his Grass, and also his Trees and Under-wood cut, took and carried away; and the said Trespases until the 27th April at divers Days and Times continued. The Plaintiff had a Verdict and entire Damages; and it was moved in Arrest of Judgment, that the cutting the Trees did not lie in Continuance.

1 Vent. 563.  
21 H. 6. 43.  
2 Lev. 210.

Holt C. J. That is very true; but then the Continuando is void as to that Trespals, and Damages shall be intended to be given by the Jury for those Trespases of which there might be a Continuance: Indeed it is here objected, that the Plaintiff at the Trial gave Evidence of the Defendant's cutting Trees and Under-wood at several Times, which could not be upon this Declaration, at least it ought not to have been, and therefore that shall not be intended. But the right way to declare for Trespases which lie in Continuance, where the Plaintiff would give Evidence of several Trespases, is for him to set forth in his Declaration, that the Defendant between such a Day and such a Day cut several Trees, and not to lay a Continuando of the Trespases from such a Day till such a Day; and upon such Declaration the Plaintiff may give in Evidence a Cutting on any Day within those Days.

Comber. 427.

And Powel J. said, If Corn, &c. is taken away at several Days, it is best to lay it tali die & diversis diebus & vicibus, inter talem diem & talem diem; for otherwise, if it be laid on a certain Day with a Continuando, you can give in Evidence but one Day, (tho' you may chuse your Day) because what is done on one Day cannot be continued: And the Chief Justice agreed it must either be so, or the Plaintiff must make several Counts for the several Days.

2 Roll. 249.

Russel *versus* Corn. Hill. 2 Ann.

**I**N this Case, by Holt C. J. A Batter may be laid to (5.)  
aggravate Damages in Trespass for breaking a Man's Mod. Caf.  
House, and beating his Servant, without saying per quod 127.  
servitium amisit; no Action lies for the Batter for a Battery  
to his Servant without per quod, &c. yet it may be well put  
in by way of Aggravation; but if you here make two  
Counts of it, one of them, viz. that for beating the Ser-  
vant, will be bad: We will suppose a Man gets another's Show. 180.  
Widow or Daughter with Child, no Trespass lies for it; 1 Keb. 787.  
tho' if he that has done it came into the House without the 2 Cro. 123.  
Owner's Leave, he may bring Trespass, and put the get-  
ting his Daughter with Child in as an Aggravation; or  
he may omit it, and give it in Evidence within the alia  
enormia, to shew the Court how enormous that Trespass  
was.

Cockcroft *versus* Smith. Pach. 4 Ann.

**I**N Trespass for an Assault, Battery and Maim, De- (6.)  
fendant pleaded Son assault demesne; which was admitted 2 Salk. 642.  
to be a good Plea in Maim: But the Question was,  
what Assault was sufficient to maintain such a Plea in  
Maim.

Holt C. J. said, That the Meaning of the Plea was,  
that he struck in his own Defence. If A. strikes B. and  
B. strikes again, and they close immediately, and in the  
Scuffle B. maims A. that this is son Assault; but if upon  
a little Blow given by A. to B. B. gives him a Blow that  
maims him, that is not son Assault demesne. Powell J.  
agreed; For, the Reason why Son Assault is a good Plea in  
Maim, is because it might be such an Assault as in-  
dangered the Defendant's Life.

Newman *versus* Smith. Pasch. 5 Ann.

**T**respass for entering his House, and Assault of himself, (7.)  
Children and Servants, and frightening of them; and Salk. 642.  
does not alledge per quod Servitium of his Servants amisit, Trespass for  
or any special Damage for the frightening of them or his entering a  
Child his Wife and Man's House  
held good. and beating  
Children.



Children. Upon Not guilty pleaded, and Verdict and entire Damages given, it was moved in Arrest, that there being no special Damages set forth by assaulting and frightening the Children and Servants, the Plaintiff could not have Judgment, these being several distinct Trespasses in themselves; but the Court held the Declaration good, for it will do by way of Aggravation. Assaulting and frightening the Children and Servants, shew what Sort of Trespass it is, and it might come very well under the *alia enormia*: As when a Man brings Trespass for entering and breaking his House, and *alia enormia*, and then gives in Evidence, that he entered his House and lay with his Daughter, and got her with Child; and held, suppose you had brought an Action for breaking your House, and then and there beating your Servants, this had been good, for that you shew what Sort of Trespass is committed, when you tie it down, that then and there he did beat that Servant; but otherwise, if he beat the Servant at another Time and Place; there you shall alledge a special Damage, as Loss of Service.

Holt said, If the Servant had been wounded, you could not give that in Evidence in this Case: And he said, that under an *Alia enormia* you cannot give several distinct Trespasses in Evidence by way of Aggravation, but you may give a Trespass in Evidence, when it is a Continuation or Consequence of the Trespass declared on.

Newman *versus* Smith. Mich. 5 Ann.

(8.) **T**HIS Day Judgment was given for the Plaintiff, per Cur'. And this Case was held to be the same with Denis and Oliver's Case, 2 Cro. 122, 123.

Eyre said this Beating and Frightning of his Children might be given in Evidence on the *Alia enormia*; therefore alledging it in Declaration will not hurt, being in both Cases to shew the Nature of the Trespass, in order to have Damages accordingly.

Anonymus. Pasch. 8 Ann.

(9.) **A**ction of Trespass for Taking the Plaintiff's Cattle; to which the Defendant pleaded, that he was possessed of a Close for a Term of Years, and the Cattle trespasssed

passed therein, &c. The Plaintiff demurred, and Judgment was given for the Defendant.

Holt C. J. The Defendant here has shewed no Title, but justified upon a bare Possession; and in these Cases there is this Difference, where the Action is transitory; as Trespass for taking Goods, the Plaintiff is foreclosed to pretend a Right to the Place; nor can it be contested upon the Evidence who has the Right; therefore Possession is Justification sufficient: But in Trespass Quare clausum fregit it is otherwise, because there the Plaintiff claims the Close, and the Right thereto may be contested in such Action.

In every Trespass quare clausum fregit, there is a Force in Law; as if one enters into my Ground, in that Case I must request him to depart, before Hands may be laid on him to turn him out; for every impositio manuum is an Assault which cannot be justified, upon Account of Breaking the Close, in Law, without a Request: Then there is an actual Force, as in Breaking a Door or Gate, &c. in which Case it is lawful to oppose Force to Force; so that if a Man comes into my Close vi & armis, I need not request him to be gone, but may lay Hands on him immediately, for 'tis but returning the Violence.

If any Persons, meeting in a narrow Passage, endeavour to force their Way in a rude Manner, or make a Struggle about the Passage, to that degree as may hurt others, it will be an Assault and Battery.

1 Roll. Rep.  
13.  
Cro. Car. 571.  
2 Saund. 401

2 Vent. 75.  
1 Saund. 35.

Mod. Cases  
149.

T R I A L S.

Ash *versus* Lady Ash. Hill. 8 W. 3.

**A**ssault, Battery, and False Imprisonment. The Lady Ash pretended that her Daughter, the Plaintiff, was troubled in Mind, and brought an Apothecary to give her Physick, and they bound her, and would have compelled her to take Physick. She was confined but about two or three Hours; and the Jury gave her 2000l. Damages.

Sir Barth. Shower moved for a new Trial for the Excessiveness of the Damages,

(1.)  
Com. 357;  
358.

Holt C. J. The Jury were very shy of giving a Reason of their Verdict, thinking they have an absolute despotick Power, but I did rectify that Mistake; for the Jury are to try Causes with the Assistance of the Judges; and ought to give Reasons when required; that if they go upon any Mistake, they may be set Right. And a new Trial was granted.

Lord Sandwich's Case. Trin. 11 W. 3.

(2.) Holt C. J. **W**Here there is Value or Difficulty, we are bound of common Right to grant Trials at the Bar. Stat. West. 2. cap. 30.

The King *versus* Thomson. Mich. 11 W. 3.

(3.)  
Cases W. 3.  
331.

**T**HE Defendant being of good Reputation, and riding in the King's Guards, was taken by a Hundred for a Robbery, on the fortieth Day; and it being feared he should be too violently prosecuted, that the Hundred might discharge themselves by his Conviction, a Trial at Bar was moved for.

Holt C. J. It has been used to grant Trials at Bar in like Cases; but there being no Bill found, he said they could make no Rule; but if there had been a Bill, he said then it might be removed by Certiorari, &c.

Argent *versus* Sir Marmaduke Darrell. Hill.  
11 W. 3.

(4.)  
2 Salk. 648.

**I**N Ejectment after a Trial at Bar, Motion for a new Trial, because the Verdict was contrary to Evidence; the Court thought so too: Rokeby was for it, on the Case in Style, the Rest contra.

2 Salk. 650.  
pl. 27.  
646. pl. 13.  
N. B. Farell.  
31, 37.  
Comberb. 18,  
75.

Holt C. J. The Reason of Granting new Trials upon Verdicts against Evidence at the Assizes is, because they are subordinate Trials appointed by West. 2. cap. 30. There have been new Trials anciently, as appears from this, That it is a good Challenge to the Juror, that he hath been Juror before in the same Cause, but we must not make our selves absolute Judges of Law and Fact too: And there never was a new Trial after a Trial at Bar in Ejectment, but in Case



Case of ill Practice; for the Plaintiff may bring a new Assignment.

Coram Holt, Turton, & Gould *Just.* Pasch.  
12 W. 3.

**B**ETWEEN the Earl of Peterborough and Sadler his Farmer, a Trial being concerning the Value of Improvement made by Sadler, a Jury of Farmers having given 200 l. Damages, which was thought excessive, and therefore a new Trial granted; and a Jury of Gentlemen order'd, who only gave 40 l. whereupon a new Trial now was moved for, for Sadler, because of Smallness of Damages; ( 5. )  
Cafes W. 3. 347.

And Holt C. J. said, that one must not always conclude, because the Court grants a new Trial, that they are satisfied that the first Verdict was bad; but it is often, because the Thing may require a Re-examination. And a new Trial was granted.

Turner *versus* Barnaby. Pasch. 1 Ann.

Per Holt C. J. **I**F the Plaintiff would have a Trial at Bar in Easter Term, he ought to move ( 6. )  
2 Salk. 649, 653.  
for it in Hillary Term; if in Michaelmas Term, he must move in Trinity Term, except where Lands lie in Middlesex; and antiently there was no other Notice given of such Trial, but the Rule in the Office; but now there must be fifteen Days Notice. And a Rule was made, that where a Ne recipiatur was entered, the Plaintiff shall give Notice the same Sittings, before they are over, that he will proceed to Trial the next Sittings.

Gay *versus* Cross. Trin. 1 Ann.

**I**N ACTION on the Case for a false Return of a Writ, &c. ( 7. )  
Farrell. 37.  
the Jury, having given their Verdict in private over Night, said that they had found the Batter specially; and the next Day in Court delivered their Verdict for the Defendant generally, and would give no Reason for it; and whereupon it was moved for a new Trial.

Holt C. J. here declared, that he never had known the like, and that he would have but little regard for the Verdict

dict of a Jury on a Trial, that would not at a Judge's Desire declare the Reason which had induced them to give it; for as the Judges of the Courts do publickly declare the Reasons of their Judgments, and thereby expose themselves to the Censure of all that be learned in the Law, and yet there is no Law obliges them to it, but it is for publick Satisfaction; so the Jury ought likewise to make known the Reason of their Verdict, when required by the Court: But notwithstanding this, and the Judges were very much dissatisfied with the Jury, it being a Trial at Bar, the Court would not grant a new Trial after that.

Tomkins *versus* Hill. Mich. 1 Ann.

( 8. )  
Farrell. 64.

**I**T was agreed by Holt C. J. and the Court, That if any Judge of Nisi prius allow or over-rule Evidence, which he ought not to have done, or if he misdirect the Jury, upon Application to the Court they will grant a new Trial; for these Trials and all Writs of Nisi prius are subject to the Inspection and Controul of the Court.

2 Salk. 650.  
Farrell. 106.

By Holt C. J. A new Trial cannot be granted in an inferior Court; for these are not like Trials by Nisi prius, which are subordinate upon Writs issuing out of this Court. Upon a Trial at Nisi prius the Jury gave excessive Damages, and for this Cause a new Trial was granted: The second Jury gave the same Damages again, and a second new Trial was moved for; but it was denied, because there ought to be an End of Things: But several Cases were cited which the Chief Justice allowed, that where upon the second Trial the Jury have doubled the Damages, a third Trial had been granted. A new Trial has been granted because the Counsel were absent, not thinking the Cause would come on, and so no Defence was made: Though a like Motion was denied by Holt; and in Coppin's Case, a Cause came on at seven o'Clock in the Morning, and an old Witness could not rise to be there Time enough; here on Motion for a new Trial, it was refused, unless he would make Affidavit of what he knew, that the Court might judge of it, and how it was material. And new Trials are never or very rarely granted, in Actions for Wounds.

1 Lev. 97.  
1 Sid. 131.  
Comb. 170.

2 Salk. 646,  
647.

Hothershell *versus* Bowes. Mich. 2 Ann.

Per Holt C. J. **A**fter a second Verdict of the same Side, (9.)  
it is not fit to grant a new Trial, be- 6 Mod. 22.  
cause the Judge did not like the Verdict; but if there were  
any Practice used in obtaining it, it is otherwise.

Wey *versus* Yalley. Trin. 3 Ann.

**I**N Action of Debt for Rent upon a Demise at London, (10.)  
of Lands in Jamaica; the Defendant pleaded to the Mod. Cases  
Jurisdiction of the Court, that it ought to be tried there, 194, 195.  
where all Actions concerning Lands are determinable: And  
here the Laws of that Country cannot be given in Evi-  
dence; because the Jury cannot inquire of it, &c.

Holt C. J. Where an Action is local, it must be laid  
and tried accordingly; therefore if the Lessor declares on  
the Privy of Estate, the Action is to be brought where the  
Land lies, and there the Trial shall be had: But where it  
is founded on Privy of Contract, which is transitory, in  
Case of Debt for Rent, it may be maintained any where.  
Here the Action is brought by the Lessor against the Lessee, 1 Saund. 238  
on the Privy of Contract; and if a foreign Issue which is Hob. 37, 233.  
local should happen, it may be also tried where the Action is 1 Cro. 143,  
laid; for which Purpose there may be a Suggestion entered 182.  
on the Roll, That such a Place in such a County is next 7 Rep. 2.  
adjacent: Whereupon the Trial shall be here by a Jury 1 Inst. 261.  
from that Place, according to the Laws of that Country; 1 Vent. 59.  
and upon Nil debet pleaded, you may give the Laws of that 1 Jon. 43.  
Country in Evidence, which we see every Day done before  
Committees of Appeals from thence.

Powel J. If a Deed bear Date out of the Kingdom,  
and the Place of the Date be not alledged somewhere in  
England, we cannot try it; but here this Action is ground-  
ed upon the Contract, which follows the Person where-  
ever he goes: And an Action of False Imprisonment has  
been brought and tried in this Court against a Governor of  
Jamaica for an Imprisonment there, and the Laws of the  
Country given in Evidence.

A Respondeas ouster was awarded.



The Queen *versus* Tracy. Trin. 3 Anni.

( 11. )  
 6 Mod. 178,  
 179.  
 6 Mod. 30,  
 114, 169.

6 Mod. 242.  
 2 Salk. 649.

**H**E was indicted, for that he together with Taylor and Jeoffreys, with Intent to oppress Muriell, false, nequiter, &c. did, at the Parish of St. Giles in Com. Middlesex, get Muriel arrested by Pretext of a certain Warrant from the Recorder of London, (reciting the Substance thereof) and that after he was arrested, they brought him before Justice Chamberlaine, in the Parish of Saint Margaret in the said County, and that Tracy did there, with farther Intent to oppress him, falsely, maliciously, &c. perswade the said Justice Chamberlaine to refuse Bail for him, though sufficient Bail were then tendered to him, and procured him to refuse the said Bail, and to commit him to Gaol, and a-vers the Refusal of Bail, and Commitment, and likewise that Tracy did perswade and procure Taylor and Jeoffreys to lay him in Irons, and use him severely, and that they did threaten to iron him, and by that Means extorted 5 l. from him. He having enter'd into a Recognizance to try this Indictment, the Venire was made from the Parish of St. Giles only; and after Verdict and Conviction it was held a Mistrial, for here being several Facts arising in several Parishes, the Venue ought to come from both, and so Judgment could not be given upon the Indictment. But the Court held that he had forfeited his Recognizance, for he had not tried the Indictment; for it must be a Trial with Effect, on which the Court may proceed to Judgment; for if we do not estreat the Recognizance, every Defendant will wilfully make Default; so that they shall always go unpunished; and we may award a Scire facias upon the Recognizance here in this Court, and determine it our selves, or have it estreated into the Exchequer. And a new Venire facias was directed, and the Defendant forced to give a new Recognizance, or he must have gone to Gaol.

Le Blanc & al' *versus* Harrison.

( 12. ) **T**HE Plaintiffs being Assignees of a Commission of Bankruptcy, brought Trover and Conversion for a certain Quantity of Silk.

The Case was thus: The Bankrupt having borrowed a great Sum of Money of the Defendant for one Quarter of a Year,

a Pear, he was to give the Defendant six Pounds for every Hundred that he borrowed; and the Silk being the Security, he was to give him one Pound more for every Hundred for that Quarter, for the Use of his Ware-house.

The Question upon the Trial was,

Whether this Contract made between the Bankrupt and the Defendant is an usurious Contract? And the Jury having found a Verdict for the Defendant, Serjeant Cheshire moved for a new Trial; for he said the Verdict was against Law.

Holt C. J. Upon a Motion for a new Trial, we would not grant it in a Case where the Verdict was against Evidence. In a Debt against an Heir, who pleaded Riens per Discent, upon which they went to Trial, and a Verdict against the Heir upon his own Miscarriage, because he forgot to bring the Deed of Intail; this Court, because it was a just Debt, and the Heir might have taken more Care, would not grant a new Trial. I think in the present Case it was a wrong Verdict.

To be moved again.

## T R O V E R.

Baldwin *versus* Cole. Trin. 3 Ann.

**I**N Trover, it appeared upon Evidence that a Carpenter sent his Servant to work at the Queen's Yard, and when he would go no more, the Surveyor refused to let him have his Tools, pretending a Usage to detain them to enforce Workmen to continue 'till the Queen's Business was done; and a Demand and Refusal was proved, &c. Mod. Cases  
212.

Holt C. J. The very Denial of Goods to him, that has a Right to demand them, is an actual Conversion, and not only Evidence of it, as has been holden; for what is a Conversion, but an Assuming upon one's self the Property and Right of disposing another Man's Goods; and he, that takes upon him to detain such other's Goods without Cause, doth take upon himself the Right of Disposing of them:

1 Lev. 173.  
10 Rep. 56.  
1 Cro. 263.  
2 Show. 148,  
175, 213.  
2 Mod. 245.

them: So the Taking and Carrying away Goods of another, is a Conversion; or if one comes into my Close, and takes my Horse and rides him. And here if the Plaintiff had received the Things upon a Tender, the Action would have lain notwithstanding, upon the former Conversion; for the Returning of the Goods after, would go only in Mitigation of the Damages: And as to the pretended Usage, that is of little Account; it may be compared to the Doctrine among the Army, that if a Man come into the Service, and bring his own Horse, the Property thereof is immediately altered and vested in the Queen; which I have already condemned.

The Defendant was found Guilty as to Part, and Not guilty as to the Rest, being ill laid in the Declaration.

See Administrator, Bills of Exchange, &c.

## T R U S T S.

Broughton *versus* Langley. Hill. 1 Ann.

2 Salk. 679.

**A** Man seized of Lands in Fee, devised them to Trustees and their Heirs, to the Intent and Purpose to permit A. to receive the Rents and Profits for his Life, and after that the Trustees to stand seized of the Premises to the Use of the Heirs of the Body of A. with Proviso that he by Consent of his Trustees might make a Jointure for his Wife; and it was questioned, whether A. had an Estate in Tail executed?

Holt C. J. He hath such an Estate; for this would have been a plain Trust at Common Law, and what by the Common Law was a Trust of a Freehold or Inheritance, is executed by the Statute, which mentions the Word Trust as well as Use: And the Change of Expression in this Case, by using the Word permit in the first Clause, which shews a Trust, and afterwards making mention of a Use, is immaterial; in regard Trusts at Common Law, and Uses are by the Statute equally executed.

27 H. 8.  
1 Vent. 232.



# VAGRANTS.

The Queen *versus* Branworth. Mich. 3 Ann.

**T**HE Defendant was indicted, for that he being an idle Person, did wander in the Town of P. selling small Ware, as a Petty Chapman; and to maintain this Indictment, it was said, that such Petty Chapman is a Vagabond by the Statute 29 Eliz. And tho' those that are qualified by 8 & 9 W. 3. may use that Occupation, yet that Act excepts Boroughs and Corporation Towns. Mod. Cases 240.

Holt C. J. A Vagabond as such is not indictable, for at Common Law a Man might go where he would; but if he be an idle and loose Person, you may take him up as a Vagrant, and bind him to his Good Behaviour; and by the Statute of Labourers, he may be compelled to serve: And being judged by a Justice of Peace to be a Vagrant, and used by him accordingly, if he offend again, then he may be indicted as a common Vagrant. There is also a Law for punishing incorrigible Rogues, by Burning them in the Shoulder; from whence it may be infer'd, that there must be a Way before of Convicting them, otherwise they cannot be punished; and that Conviction must be by Indictment. 3 Inst. 103.  
Reg. Jud. 27.  
See Stat. 12  
Ann. c. 23.

The Rule for Quashing the Indictment was enlarged.

# VENUE.

Trin. 7 W. & M.

Holt C. J. **I**F a Cause of Action arises partly in one County, and partly in another, it is in Election of Plaintiff to lay it in which County he pleases; as if a Country Chapman sends a Letter to a Tradesman in London, to send him Goods into the Country, he delivers them accordingly, and they (1.)  
Cases W. 3.  
76.

they come to the Chapman's Hands; there the Cause of Action arising in both Counties, he may lay them in either.

Holt C. J. As a Sheriff is not bound to execute Writs in Person, but may under Hand and Seal direct his Warrant to Under-Bailiffs, so the Bailiff of a Liberty may do the same; but then no Servant of the Under-Bailiff can execute a Warrant, but it must be by the Bailiff himself, to whom the Warrant is directed.

Lady Calverley *versus* Sir Richard Leving.  
Pasch. 10 W. 3.

( 2. )  
Com. 472.

**C**ovenant laid at Tarvin in the County of Chester, upon a Demise of a House situate in the City of Chester; and several Breaches were assigned, viz. for Non-payment of the Rent, and for not keeping the House in Repair. The Defendant, as to the Rent, pleaded Riens arrears; and that he had kept the House in good Repair; &c. whereupon several Issues were joined, and the Cause was tried by Mittimus before the Chief Justice of Chester at the last Assizes: Where the Plaintiff obtained a Verdict, and several Damages upon the several Issues. And now it was moved by Sir Barth. Shower, that this was a Mistrial as to the Repairs; for it appears the House is in the City of Chester, which is a distant County; and the Issue being local, could not be tried by a Jury de Vicineto de Tarvin in Com. Cestr', and to that Opinion the Chief Justice at first inclined; but afterwards the whole Court held, that it was aided after the Verdict by the Stat. 16 & 17 Car. 2. being tried by a Jury of the County where the Action was laid.

Pasch. 13 W. 3.  
Cases W. 3.  
915.

In Case for a False Return to a Mandamus, for restoring to an Office in the Corporation of Orford; the Action being laid in Suffolk; it was moved to have it laid in another County, to preserve the Peace and Quiet of Suffolk. Per Cur': It is a good Cause to change a Venue to preserve the Peace of the County; but this Action being a local one, must in its Nature be brought either in Suffolk, where the false Return was made, or Middlesex, where it appeared on Record; and the Plaintiff has his Election, by Law, of the two Counties, and the Court cannot lay it without his Consent in either of the two Counties; for it consists of two Falsities: 1. Of the Fact; and, 2. The Falsity of Returning it on Record. It was agreed, that in transito-

ry Actions the Plaintiff has not a peremptory Election, but the Defendant might transfer it to the right County, unless the Plaintiff would be bound by Rule to give material Evidence of some Fact in the County where he laid it. And my Lord Shaftsbury's Case was strongly urged, where, because of his great Interest in London, an Action of Scandalum Magnatum laid by him there, was removed.

Holt C. J. said, that was a Case of the Times, and when Things were in a great Ferment; and I do not know that that Case was founded on Law and Reason; for in Case of Scandalum magnatum, it was always ruled the Venue could not be changed.

Boisloe *versus* Baily. Mich. 3 Ann.

**I**N Trespass for Assault, Battery and Wounding, the Defendant as to the Vi & Armis pleaded Not guilty; and as to the Residue pleads a Submission to an Award of all Controversies, and sets forth the Award made, viz. That the Defendant should provide such an Entertainment for the Plaintiff and his Friends on such a Day, in Satisfaction of the said Trespass; and avers that he did provide it, &c. Among other Exceptions, it was here objected, that there was no Venue laid where the Things were provided, only at the Defendant's House in Old Bedlam; and in London the Venue ought to be laid in the Ward, or in a Parish at least, which is in Nature of a Will in a County.

(3.)  
Mod. Cases  
221, 222, 265.  
3 Salk. 351.

Holt C. J. The Want of a Venue is only curable by such Plea, as admits the Fact for which it was necessary to lay the Venue; as if Debt be upon Bond, and no Venue laid where the Bond was made, if Demurrer be to it, it will be ill: But if the Defendant plead a Release, whereby the Bond is admitted, that helps the Declaration. Though in this Case, by Reason of the Frivolousness of the Action, the Court gave no Judgment, but advised the Parties to compromise the Matter.

Per Cur': If a Man sign a Lease, in one County or Will, of Lands in another, yet the Jury must come from the Place where the Land is, in an Ejectment upon such Lease, for that is the right Venue; but that Fault is cured after Verdict, by the Statute of Oxford.

Knight



Knight *versus* Farnaby & al'. Pasch. 5 Ann.

(4.)  
2 Salk. 670.

**T**HE Plaintiff, who was Clerk of Assize of the Norfolk Circuit, brought an Action against the Defendant, for a Battery committed in Kent, and laid the Action in Middlesex: Upon the usual Affidavit this Venue was changed; and now on the Plaintiff's Motion that Rule was set aside, and the Venue brought back again.

1 Lev. 207.  
1 Sid. 326.  
1 Mod. 37.

Holt C. J. If by Law the Place were material, a Defendant might give in Evidence, as he does in criminal Prosecutions, that the Battery was done in another County: However it is now allowed and become the Course of the Court to change the Venue for the Defendant, on the common Affidavit of such Matter, &c. a Practice which came up in R. James the First's Time; but that Rule hath never obtained in Cases of privileged Persons, as Barristers, &c. who are to attend at Westminster, and therefore have the Liberty of laying their Actions in Middlesex. And the Plaintiff here is an Officer and Minister, bound to attend the Judges of Assize, and likewise above to return the Postea's on Trials.

2 Salk. 668.

The Motion to change a Venue ought to be within eight Days after the Declaration delivered; but this Rule is not always adhered to: Heretofore it was never granted after the Rules for Pleading were out. Per Holt C. J.

Smith *versus* Farnaby. Mich. 5 Ann.

(5.)  
The Clerk of the Assizes shall have the Privilege to lay the Venue in Middlesex.

**T**RESPASS for Assault and Battery, and the Action was laid in Middlesex; prayed the Venue might be changed to Kent on the Common Affidavit, viz. the Assault and Battery, if any was, in Kent; the Plaintiff prayed he might continue the same in Middlesex, because he was Clerk of the Assizes in Norfolk, and therefore to attend the Justices here in Westminster; and the Court did agree therein; and first they said, that if a Serjeant, Barrister, or Attorney, brought any transitory Action in Middlesex, the Venue shall not be changed to any other County; because the Law is, that a Plaintiff may bring his transitory Action where he will; and tho' the Court, since the Time of King James I. have changed the Venue on the common Affidavits; yet this shall not be extended to take away the Privilege of those who

who are to attend the Courts of Westminster; but no such privileged Person shall be exempted from the Rule of changing the Venue on the common Affidavit, if they bring their Action in any other County except Middlesex: Resolved, that the Clerk of the Assizes is Clerk to the Justices here, and to attend here with the Returns of the Postea.

Holt C. J. said, The Power of the Clerk of the Assizes is from the Courts of Westminster, and answerable to them; besides, if one of the Judges of Assizes falls sick, the Clerk of the Assizes shall certify with the other Judge; and if both the Justices of Assize die before the Day in Bank, the Executors of the surviving Judge shall not subscribe the Postea, but the Clerk of the Assizes, for he is an Associate: So the Venue was not changed, and the Plaintiff had his Privilege.

See Appeals and Trials.

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## V E R D I C T.

Heliard *versus* —. Mich. 12 W. 3.

Holt C. J. **I**F a Verdict find one another's Receiver or Bailiff generally, it subjects the Defendant to account for the whole Declaration; but if it find him Receiver only specially, as to such and such Things, he is only accountable pro tanto. Cases W. 3: 420.

## V I E W.

Anonymus. Mich. 4 Ann.

<sup>2</sup> Salk. 665. By Holt C. J.

**B**EFORE a Rule is made for a View, the Venire facias must be returned, and then we may make a Rule, that so many of the Panel of

<sup>2</sup> Saund. 254.<sup>1</sup> Keb. 279,<sup>4</sup> 18.<sup>6</sup> Mod. 265.

Juroz shall view the Premises in Question. And it has been ruled, that when, in order to a View, the last Juroz is withdrawn, the Plaintiff should take out a new Distringas, amoto the last Man of the Panel, to distrain the other Twenty-three with an Apponas etiam decem tales.

<sup>2</sup> Lill. Abr.<sup>6</sup> 55.<sup>4</sup> & <sup>5</sup> Ann.<sup>c.</sup> 16.

This View for the Jury to see the Land or Thing claimed, formerly could not be granted in a Personal Action, but upon withdrawing of a Juroz after they were sworn, and Consent of the Parties by Rule of Court; but now by a late Statute, it is grantable in any Action brought in the Courts at Westminster, where necessary the better to understand the Evidence upon the Trial; in which Case, the Courts may order special Writs of Distringas or Habeas corpora to the Sheriff, requiring him to have six of the Juroz, or a greater Number of them at the Place in Question, some Time before, who shall have the Matters shewn to them by two Persons named and appointed by the Court; and on the Writ the Sheriff shall specially return the View made accordingly, &c.



# VISITORS.

Philips *and* Bury. Trin. 6 W. & M.

**I**N Ejecment, Philips declares upon the Demise of William Painter Rektor of Exeter College, and the Scholars of the same College, of a certain Messuage called the Rectory House, &c. to hold from Michaelmas, which was the second Year of their present Majesties, until the End and Expiration of five Years then next following: That he entered into the Premises, and was possessed till the Defendant ejected him. To this the Defendant pleads, That the said Messuage, at the Time of the Action brought, and long before, was the Freehold and Soil of the Rektor and Scholars, &c. and that the said Defendant long before, and at the Time of the supposed Ejecment, was, and yet is, Rektor of the said College; and by Reason thereof the Defendant in Right of the Rektor and Scholars of the said College, into the said Messuage, &c. did enter, and the said Robert Philips did remove, as he lawfully might: And traverses, that the said William Painter then was, or is Rektor of the said College. The Plaintiff replies, and confesses the said Messuage to be the Freehold and Soil of Exeter College; but says farther, that at the Time of the said Trespass and Ejecment, the said William Painter was, and yet is, Rektor of the said College: Whereupon there is Issue joined, and a Trial had before the Justices in the King's Bench, and a Special Verdict is found. They find, that before the Demise in the Declaration, the College of Exeter was, and yet is, a Body Politick and Incorporate, by the Name of the Rektor and Scholars; and that from the Foundation of the said College, divers Laws and Statutes were made for the better Government of the said College; and that by the same Statutes the Bishop of Exeter for the Time being, and no other, was appointed Visitor of the said College, according to the Effect of the Statute found in the Verdict: And that the Bishop of Exeter that now is, at the Time of the Appeal in the Verdict mentioned, was, and still is, Visitor of the said College, by Virtue of, and according to the Statutes of the said College; and then find the Statutes in hæc verba, and the Statute for the

the Election of the Rector, and the Oath to be taken by him upon his Election; by which Oath, among other Things, he swears the Liberties and Privileges of the College to keep and defend. They farther find the Statute for expelling any Scholar convicted of Adultery, &c. before the Rector, Sub-Rector, Dean, and five other of the Senior Fellows, or the major Part of them, with the Assent of the Rector, and the Statute whereby the Bishop of Exeter, for the Time being, is constituted Visitor; and that it shall be lawful for the said Bishop, and to no other, as often as by the Rector of the College, and in his Absence, by the Sub-Rector, and four others, at least, of the seven Senior Fellows, he shall be requested, and also without any Request de quinquennio in quinquennium semel, to the said College by himself, or his Commissary, to come, and to enquire of all Things contained in the said Statute, and of any other Particulars; and to do all other Things which be fit and necessary to the Correction and Amendment of the said College, etiam si ad deprivationem aut amotionem Rectoris, Sub-Rectoris, aut alterius cujuscunque, statutis et ordinationibus id exigentibus, procedere contingat; and that the Statute directs the Visitation shall continue but two Days, nisi ex causis ingentissimis & rarissimis; and if ought remains unfinished at the End of the Visitation, it is to be left in Writing with the Rector, and he is to see it amended according to the Statute, upon the Penalty of Contempt; and then proceeds to the manner of proceeding by the Visitor at his Visitation, si tamen ad privationem, aut inhabilitatem Rectoris, aut expulsionem Scholaris per Episcopum aut ejus Commissarium agatur, &c.

Skin. 449.  
&c.

Then they find the Statute for removing the Rector; and that before the Time of the Demise, viz. the 6th of October in the first Year of their present Majesties, one J. C. a Fellow of the said College was convicted of Incontinency before the Defendant, then Rector of the said College, the Sub-Rector, and Dean, and five others, the Senior Scholars of the said College, with the Assent of the Rector; and for that Reason excluded the College. That from this Sentence of Expulsion the said C. appealed to the Visitor, who in February 1689, appointed Dr. Masters, his Commissary, to hear and determine the said Appeal, and find the Commission in hæc verba; and that upon that Appeal the said C. was restored. That upon the 16th of May following, a Motion from the said Bishop was directed to the said Dr. Bury, then Rector, and to the Sub-Rector of the said

said College, requiring them to appear before the said Bishop or his Commissary, in the Chapel of the said College, upon the 16th of June next following; of which the Rector and Scholars had Notice: That upon the said 16th of June, the said Bishop came to the College, in order to visit the College, and went to the Chapel, which he found locked; that the Rector and Scholars, in the Court of the said College, offered to deliver to the Visitor a Protestation under the College Seal; in which they set forth, as a Reason for not obeying the Citation, the Bishop's having visited the February before by Dr. Masters. They find the Visitor refused to accept the said Protestation, and that Francis Webber being sworn declared upon Oath, that the said Citation was read in the Chapel of the College before the coming of the Bishop. They find, that the Visitor called over the Names of the Rector and Scholars, and that the Rector and some of the Scholars would not appear; that the Chapel Door was shut, and that the Porter being called, and not appearing, the Visitor departed; nothing more being done. They further find, That the Visitor afterwards, 1 July 1690, by a certain other Writing sealed, cited the said Rector and Scholars by Name, to appear before him in the Common Hall of the College, upon Thursday the 24th of July following, whereof the Rector and Scholars had Notice, and did protest by a Writing under their Common Seal against the intended Visitation; which is found in hæc verba. The Protestation sets forth the Statute de visitatione, by which the Visitor is to visit de quinquennio in quinquennium; and then shews that he visited by his Commissary Dr. Masters in March; and that five Years are not since elapsed; and that they are sworn to preserve the Statutes and Privileges of the College, and so give their Reasons why they cannot submit to this Visitation. They find, that the Visitor proceeded July the 24th in his Visitation; that Dr. Bury and divers of the Scholars being summoned did not appear, whereupon they were pronounced Contumacious, and for their Contumacy suspended. They find the Visitor made an Act of the Proceeding upon the 16th of June, and that upon the 26th of July the Visitor, by the Consent of four of the Senior Fellows of the College, then present in the University, and not suspended, deprived the said Rector: That four of the assenting Fellows were not four of the seven Seniors, unless by the Expulsion of Dr. Hern, and the Suspension of five others their Seniors: That after the



said Sentence William Painter was chosen Rector: That the 1st of June 2 Jac. 2. and always after, till the Sentence given, Dr. Bury was Rector, and still is, unless the Sentence prevail to the contrary. They find the Lease by William Painter to the Plaintiff, and that he was possessed by Virtue thereof till the Defendant ejected him; and if Painter, or the Defendant be Rector, was the Question?

The Court gave their Judgment seriatim; and per Samuel Eyres, Giles Eyres, and Gregory Justices, Judgment ought to be given for the Defendant.

Skin. 475.

Holt C. J. Exeter College in Oxon was founded by William Stapleton, to consist of a Rector and Scholars: By the Statutes and Constitutions of the College, the Bishop of Exeter for the Time being, is appointed Visitor; and the Time is set when he shall visit, at the Request of the College, as often as they shall think requisite; and without such Request once in five Years ex officio. Then it is directed, that in his Visitation he may proceed to the Depri- vation of the Rector, or to the Expulsion of the Scholars: Then there is a Qualification of this Power by particular Words of the Statute, *si tamen, &c.* he shall shew to him his Crime, and if he cannot probably make out his Inno- cence, then he may deprive him; *dum tamen ad ejus, &c.* there shall be the Consent of four of the seven Senior Scholars. Then the Statute goes on farther, that if the Rector be removed by the Bishop's Commissary, etiam con- sentientibus four of the seven Senior Fellows, he may ap- peal to the Bishop.

There is another Statute that shews for what Crimes he shall be deprived, the Method that shall be taken against him when they proceed to Depri- vation; that is, within fifteen Days after the Fact committed, he shall, by the Col- lege, be admonished to resign; then they are to apply to the Bishop, and if he be convicted, the Bishop, or his Vicar may proceed to deprive him.

One Colmer, a Scholar, was expelled the College for Incontinency; against this Expulsion he appeals to the Bishop; the Bishop grants a particular Commission to Dr. Masters to examine this Appeal; he goes into the College, his Proceedings are found in the Verdict, he reverses the Sen- tence of Expulsion, and restores Colmer to his Scholarship.

After this, the Bishop appoints a Visitation to be held in the Chapel of the College the 16th Day of June; ac- cordingly the Bishop comes, the Chapel Doors are shut; the Rector and Scholars would not open the Door, but pro- test

test in the Area against the Visitation; the Visitor calls over the Names, and swears one to prove the Summons. After this there is another Visitation appointed in the Hall the 24th of July, at which Time he comes, and divers Protestations against the Visitation are made; but he proceeds, calls over the Names, registers the Act of the 16th of June; and upon several Warnings to appear, Dr. Bury and other of the Fellows refused to submit to the Visitation, and are pronounced Contumacious. The Bishop first voided Dr. Hern's Place, and suspended five of the Senior Fellows; and with Consent of four of the Senior unsuspended Fellows, deprived the Rector Dr. Bury. That Sentence of Deprivation being thus given, the College proceeds to a new Election, and elects Mr. Painter, who joins in the Lease to the Plaintiff, upon which this Action is brought.

The Question is, Whether this Sentence against Dr. Bury made the Rectoryship of Exeter College void as to him, and so consequently gives the Title to the Lessor of the Plaintiff?

My Brothers have given their Opinions, that this Sentence is void; that Dr. Bury continues Rector, and that Judgment ought to be given for the Defendant. I must crave Leave to differ from them; for I am of Opinion upon this Verdict, Judgment ought to be given for the Plaintiff; and that this Deprivation by the Visitor is a good Deprivation to void the Rectory.

The Questions that I make in this Case are but two.

The first, Whether or no, by the Constitution of this College, the Bishop of Exeter had Power in the Case to give a Sentence?

The second is, Supposing he had such a Power, whether the Justice of this Sentence is examinable in this Court upon this Action?

I am of Opinion that the Bishop had Power, by the Constitution of the College, to give a Sentence; and having that Power, the Justice thereof is not examinable in a Court of Law, upon any Action concerning the Bishop's Power. There have been several Things said which I would take some Notice of: And the first Thing is, What Time he hath by the Constitution of the College to make his Visitation. And I do agree he can make his Visitation but once in five Years, unless he be called by the Request of the College; and if he comes uncalled within the five Years, his Visitation will be void. But I hold the Visitation the 24th of July a good Visitation, and consequently the

the Sentence given upon it is good. Two Things are said against it; First a Question is made, whether Dr. Masters coming in March to examine Colmer's Appeal upon the Visitor's Commission were not a Visitation? I think there is no Colour that it should be a Visitation, because it was a Commission upon a particular Complaint, and not a general Thing. Colmer complains he was expelled without just Cause, and seeks to the Visitor for Redress; and the Visitor sends his Commissary to examine this particular Matter: Tho' a Visitor be restrained by the Constitutions of the College from visiting ex officio but once in five Years, yet as Visitor he has a standing constant Authority at all Times, to hear Complaints and redress Grievances of the particular Members. Litt. Sect. 136.

So held in Appleford's Case, who was expelled upon the like Occasion; he appealed to the Bishop of Winton, who was Visitor, and he confirmed the Expulsion upon the Appeal; for it is a standing constant Jurisdiction that the Visitor hath. Visiting is one Act, in which he is limited as to Time, but Hearing Appeals and Redressing Grievances are his proper Office and Work.

It is the Case of all the Bishops in England, they can visit by Law but once in three Years; but their Courts are open always to hear Complaints, and determine Appeals: So that here, tho' the Bishop can visit but once in five Years, unless called; yet he has a Power to hear any Difference between the Members, and redress any particular Injury at any Time.

The next Thing is, Whether what was done the 26th of June was a Visitation; there is no Question but he intended to visit then, and came there to proceed therein, but they would not let him come into the Chapel, where he had appointed it to be held. It is strange then to construe his coming there to be a Visitation. It appears he did not any Act, but called over the Names; and Reason he should, to see who it was that hindered him from visiting?

But then they say, that after this, he made an Act; he administered an Oath at that Time, but when he came in July he made an Act of it; therefore (says my Brother) this is a Tacking the Visitation in June to that of July; and then the Visitation continued much longer than it can continue by the Statutes of the College; for it is thereby to cease in three Days.

I make a quite other Construction of it; when he was hindered in June, and makes an Act of this at his Visitation



on in July, that was only in order for his calling them to account for their Contumacy as a Fault, and to bring them in Judgment at his Visitation; it is no more than taking an Affidavit of the Service of his Citation.

Ap; But now he hath appointed another Visitation to be held in the Hall; what, doth that alter the Case? Nothing at all: It was before no Visitation through their Obstruction; and that was one Thing he would call them to account for: And it would be a strange Consideration, that when he designed his Visitation in the Chapel, but was hindered by their Means, that Impediment should amount to a Visitation; and it would be a strange Escape for them, if they should, by their former Contumacy, get off from being Subject to a true Visitation.

The next Thing to be considered is, what ariseth upon the Consideration of the Statute de privatione; whether there is a Necessity that there should be a Consent of the four Senior Fellows to the Deprivation of the Rector? for, if there was such a Necessity, I must agree this Sentence had been a Nullity. But as this Statute is framed, I conceive it is not necessary; but that the Bishop has a Power to deprive him, though they concur not. First, by the Statutes, the Bishop of Exon for the Time being is made the Ordinary Visitor; and I take it to be clear, that where any one is Visitor of a College, he has full and ample Power to deprive and amove any Member of the College quatenus Visitor.

Secondly, There is an express Power given to the Bishop to proceed to the Deprivation of the Rector, or the Expulsion of a Scholar, and this in his Visitation. But,

Thirdly, To consider these qualifying Words, whether the Bishop's Power as to the Rector be restrained to be with the Consent of the four Senior Fellows; the Words are si tamen, &c. and I would observe, it is deprivatio as to the Rector, and expulsio as to a Scholar. And tho' I agree the Words, as to real Sense, are synonymous, yet by this Statute they are differently applied. Then it says, That if the Bishop, &c. that only relates to the Scholar; because the Word there used, expulsio, doth only relate to the Removal of a Scholar all along: And it is impossible it should relate to the Rector; for then he must consent to his own Deprivation, for his particular Consent is required and mentioned. In this Place the Consent of three of the four Senior Fellows is not to do, without there be the Consent of the Rector.

But then the subsequent Words are, That if the Rector be deprived by the Bishop's Commissary, although four of the Senior Fellows do consent, he may appeal to the Bishop. But where are there any Words that abridge the Bishop's own Power? The Commissary's Power seems to be abridged by these Words, To have their Consent; and yet that is but by Implication neither; but the Statute hath appointed no Qualification of the Bishop's Power: Here are express Words that he may proceed to the Deprivation of the Rector, not only by the general Words of making him Visitor, but by particular Words in the very Statute.

It is objected, That it is very unreasonable to imagine the Founder should give a greater Authority to the Visitor over the Rector than the Scholars.

The Question is not what is reasonable for the Founder to do, but what he has done, upon Perusal of the Statutes? Suppose he gives the Bishop such an absolute Authority, it is not in our Power to controul it for the imagined Unreasonableness; for he had such an Authority and Interest himself in what was of his own Creation, that he might invest him with any Power over it that he was pleased to give him.

And it is to be supposed, if he hath done so, he had some Reason for doing it; tho' if he had not, it is not material: His Will is his Reason in disposing and ordering his own; it is not in our Power to take away this Authority from him, because we think it unreasonable.

Then consider; the Rector has a Benefit, which the Scholars have not; for, if the Commissary visit the College, and deprive him, with the Consent of the four Senior Fellows, he may have an Appeal to the Bishop; but the Scholars can have no such Appeal: And it may be, the Founder thought fit to trust the Rector with the Bishop alone, as knowing he would take more Care of the Head of the College, than he would of the inferior Members of it.

If the Bishop of Exeter be by the Statute, in express Words, made Visitor of the College by the Founder, and since he has, by express Words, given him a Power to proceed to the Deprivation of the Rector, and there are no Words to lessen that Power, I would fain know how we can make such a Construction, as to limit this Power to the Consent of four Senior Fellows, because it is said, he may appeal if the Commissary do it, though they do consent.

So that, I think, upon these Statutes, the Bishop being made Visitor, and having Authority to deprive him, without

having any Qualification of that Authority, he might proceed to deprive him, without the Consent of the four Senior Fellows; though I do agree, if their Consent had been necessary, the Suspension doth not make them no Fellows during the Suspension. It is only an Impediment to them from enjoying any Benefit from their Office, but it makes no Vacancy of the Office; for if a Minister be suspended, during the Suspension the Place is full; and if the Rector had been suspended, the Rectory had been full, and he might have maintained an Assize. Then if a suspended Fellow remains a Fellow, then if it were necessary for them to consent, such Fellow is impowered to consent; but I think it was not at all necessary.

The next Point is, whether the Bishop, supposing him to have Authority to deprive, and he doth by Sentence deprive, the Justice of this Sentence be examinable in any of the Courts in Westminster-Hall? That is,

First, Whether the Sufficiency of the Sentence, as to the Cause, be examinable in the Common Law Courts? And,

Secondly, Whether the Truth of that Cause, suppose it be sufficient to ground the Sentence, if true, can be inquired into here?

And I think the Sufficiency of the Sentence is never to be called in Question, nor any Enquiry to be made here into the Reasons of the Deprivation. If the Sentence be given by the proper Visitor, created so by the Founder, or by the Law, you shall never enquire into the Validity, or Ground of the Sentence. And this will appear, if we consider the Reason of a Visitor, how he comes to be supported by Authority in that Office. There are in Law two Sorts of Corporations aggregate of many; such as are for publick Government, and such as are for private Charity. Those for publick Government of a Town, City, Mystery, or the like, being for publick Advantage, are to be governed according to the Laws of the Lands, not supportable by any private Statutes or Constitutions, but subject to the Laws of England, and to be regulated and reformed by the Justice of Westminster-Hall. Of these there is no particular private Founder, and consequently no particular private Visitors; there are no Patrons of these, they only subsist by Virtue of the King's Letters Patent, and are supported by the Methods of Law; therefore if a Corporation be made for the publick Government of a Town, or City, and there is no Provision in the Charters how the Succession shall continue, the Law supplies the Defect of that Constitution,



tution, and says, it shall be by Election of Mayor, Aldermen, Common-Council, and the like. 1 Roll. Abr. 513.

But private and particular Corporations for Charity, founded and endowed by private Persons, are subject to the private Government of those who erect them; and therefore if there be no Visitor appointed by the Founder, I am of Opinion that the Law doth appoint the Founder and his Heirs to be Visitors. The Founder and his Heirs are Patrons, and not to be guided by the Common known Laws of the Kingdom. But such Corporations are, as to their own Affairs, to be governed by the particular Laws and Constitutions assigned by the Founder. It was said, the Common Law doth not appoint a Visitation at all; I am of another Opinion; the Law doth, in Defect of a particular Appointment, make the Founder Visitor: If he is silent during his own Time, the Right will descend to his Heirs. Yelv. 65. and 2 Cro. 60. So 8 E. 3. 70. and 8 Asl. 29. So that Patronage and Visitation are necessary Consequents one upon another. For this Visitation Power was not introduced by any Canons or Constitutions Ecclesiastical; it is an Appointment of Law; it arises from the Property which the Founder had in the Lands assigned to support the Charity; and as he is the Author of the Charity, the Law gives him and his Heirs a Visitation Power, that is, an Authority to inspect their Actions, and regulate their Behaviour, as he pleaseth.

Indeed, where the Poor are not incorporated, according to the Case in 10 Co. there is no Visitation Power; because the Interest of the Revenue is not vested in them: But where they are incorporated, there, to prevent all perverting of the Charity, there is by Law a Visitation Power: And it being a Creature of the Founder's own, it is Reason he and his Heirs should have that Power, unless they please to devolve it elsewhere.

In our old Books, Deprived by Patron, and Deprived by Visitor, are all one. For it is a Benefit that naturally springs out of Foundation; and it is in his Power to transfer it to another.

There is no manner of Difference between a College and an Hospital, except only in Degree. An Hospital is for those who are poor, and mean, and sickly; a College is for another Sort of indigent Persons, but it has another Intent, to study in, and breed up Persons that have not otherwise wherewith to do it. And if in an Hospital the Master and Poor are incorporated, it is a College ha-

ving a Common Seal to act by, although it has not the Name of a College, because it is of an inferior Degree; and in the one Case, and in the other, there must be a Visitor.

A Visitor being then of Necessity created by Law, as 8 Ed. 3. 69, 70. every Hospital is visitable; what is the Visitor to do? He is to judge according to the Statutes and Rules of the College; he may expel; and as in the 8 Aff. 29, 30. he may deprive. If he is a Visitor as ordinary, there lieth an Appeal from his Deprivation; but if as a Patron, then there was none.

But you'll say, this Man hath no Court. It is not material whether he hath a Court or no; all the Matter is, whether he hath a Jurisdiction; if he hath Consuance of the Matter and Person, and he gives a Sentence, it must have some Effect to make a Vacancy, be it never so wrong. But there is no Appeal, if the Founder hath not thought fit to direct an Appeal; that an Appeal lieth in the Common Law Courts, is certainly not so. This is according to the Government settled by the Founder; if he hath directed all to be under the absolute Power of the Visitor, it must be so.

He is a Judge not only in particular, by the Founder's Appointment, but he has a general Authority by Law, as Visitor. Who shall judge him? Shall we summon the Heads of the Colleges in the University, to judge whether he has done Right or Wrong? That is not to be done; it would bring great Confusion and Dischief to the University.

It is plain by all the Authorities of our Books, and the Way of pleading, that it is as I say. If a Sentence of Deprivation be pleaded, you need not shew the Cause: It is not traversable, even in a Visitation, when it is by the Visitationary Power. Rastall's Ent. fol. 1. 11 H. 7. 27. and 7 Co. Kenn's Case. Suppose that this Rectory had been a sole College, and not a Corporation aggregate, and Dr. Bury had brought an Assize, and this Deprivation is pleaded, would it not be a good Plea, to shew that the Visitor had pro certis causis, &c. deprived him? Without all Question, and it had not been traversable: For every Thing that is traversable, must be expressed in Certainty; then if not traversable, it is not questionable. It is strange, that pleading a Sentence without a Cause should be good, and the finding a Sentence in a Special Verdict, should not be as good and conclusive to the Party.

As to the Matter of there being no Appeal from an arbitrary Sentence; it is true, the Case is the harder, because the Party is concluded by one Judgment, but it doth not lessen the Validity of the Sentence, nor doth it any Way prove that you shall find out some Way to examine this Matter at Law in a judicial Proceeding.

If the Constitution had been, that if the Visitor doth deprive the Rector, then it should be in his Power to appeal to the Archbishop of Canterbury, it perhaps had been more equitable. But in that Case, if there had been an Appeal, and the Sentence had not been reversed, then the Deprivation had been in Force, and, every one would say, irremediable in any Court of Law. And I do not know any Authority of Law that makes out the Sentence to be the weaker, because he is barred of an Appeal.

In that Case of Cawdry, a Sentence of Deprivation was given against him, and there was no Appeal. The Sentence was found, but no Cause shewn, and so the Cause did not appear; yet it was held well enough, though there was no Appeal.

How doth my Brother Eyre distinguish this Case from ours? He says it was by Virtue of the Ecclesiastical Law: What, is it the Ecclesiastical Law, that a Man shall be concluded by one Sentence without an Appeal? No, it was because it was by the High-Commission Court, that had Jurisdiction; and yet the Sentence was not the weaker, or more traversable, because there was no Appeal. You will agree, that if there did lie an Appeal in the Case, it was not examinable; I would fain know the Difference. It was by the Ecclesiastical Constitution, that these Commissioners have their Power, but that is established by the Law of the Land; and so is this Visitatorial Power: The one derives his Authority as much from the Law as the other. If then in one Case the Sentence be conclusive, why not in the other?

It was so in the Case of Bird and Smith, where a Man was deprived for not conforming to the Canons. A Case certainly very hard, for all the Canons are not certainly according to Law, nor any of them obliging here, farther than as received and allowed Time out of Mind.

As to the Cases of Coveny and Baggs, I take the Case to be all one as to this Matter; though in two Books, and there being an Error in the first Concoction, it was not to be rectified afterwards. He was deprived by the Visitor, not as Ordinary, but as Visitor; the Question,



whether there could be an Appeal from the Visitor's Sentence to the King? it was held, there could be none to the Archbishop, because it was not done as Ordinary, but as Visitor. What then? why there is this Collection by the Reporter; *Ex hoc sequitur*, &c. That is cited in Bagg's Case, and was the Ground of the Opinion of my Lord Coke. And he there quotes the Book of Ed. 3. and 8 All. for such a Distinction; but there is no such Difference in the Book. The Party is concluded in the one Case, as well as in the other; therefore there is an End of that Opinion, for the Foundation is quite fallen. Besides, it is reasonable to suspect that Case not to be Law, when that is impracticable which it is brought to prove. The Head of a College cannot maintain an Assize for his Office of Headship; he hath not such an Estate as will maintain it. Therefore to give such an Instance as in Coveny's Case, is to overthrow the Authority of the Case. The Head of such a Body hath no sole Seisin, the whole Body hath an Interest therein; he has not a Title to a Penny of the Revenues in his own Right, till by Consent they are privately divided and distributed; and then too it is not the Rector's Honey, it is Dr. Bury's Honey after Division.

In Appleford's Case the like Argument was urged in Lord Hale's Time; and then it was insisted upon that he might have an Assize. No, says my Lord Hale, that is impossible. And I remember very well, he did disallow of that Opinion of my Lord Coke.

I know no Difference between this Case and that of a Mandamus. In that Case of Appleford there was a Mandamus brought, to restore him to his Fellowship: It was returned, that by the Statutes of the College, for Mis-demeanour they had a Power to turn him out; and that the Bishop of Winchester was Visitor, and that he was turned out *pro crimine enormi*, and had appealed to the Bishop, who confirmed the Expulsion; and the particular Cause was not returned: I was of Counsel for the College, and we omitted the Cause in the Return for that Reason, because indeed it was not so true as it should have been. It was insisted, that we ought to shew the Cause in the Return, to bring it within the Statutes. It was answered, here was a local Visitor, who has given a Sentence; and be it right, or be it wrong, the Party is concluded by it; and you must submit to such Laws as the Founder

Founder is pleased to put upon you. And Mr. Appleford was not restored.

This is an express Authority to guide our Judgment in this Case. Here is a local Visitor hath given a Sentence, he hath declared the Rector to be actually deprived of his Place. When shall we know when a Deprivation is good? If not upon a Mandamus, why in an Ejectment?

For the next Point; It doth not appear there was any Injustice in the Sentence; why then shall we not presume it to be just? We are to give a Credence to a Man who exerciseth judicial Power, if he keep within his Jurisdiction. The Law hath Respect not only to Courts of Record, and judicial Proceedings there, but even to all other Proceedings, where the Person, that gives his Judgment or Sentence, hath judicial Authority, and you shew no Fault in the Sentence.

It seems to me, that the Cause of Deprivation is a good Cause, it being for Contumacy. If the Bishop had Power to visit in June, as I think he had, and was hindered by the Shutting the Doors, whereupon he went away without doing any Thing, and came again in July, when he held his Visitation, and they carried themselves contumaciously, and refused to submit to his Authority; this was *contra officii sui debitum*. Contumacy was held a good Cause of Deprivation in Bird and Smith's Case, and in the Case of Allen and Nash. Though this is not one of the Cases mentioned in the Statute of Deprivation, yet when the Bishop comes to make a Visitation, and the Members refuse to submit, it is certainly contrary to their Duty. And I do not think their Entering a Protestation against the Visitation was any Affront, that was surely very lawful; but their Turning their Backs upon the Visitor, not Appearing upon Summons, and Refusing to be examined, was an Offence, and contrary to the Statutes: For he is to enquire into the State of the College; and if he comes to make such Inquisition, and the Head and Members run away, or will not appear to be examined; I know not what can be a good Cause of Deprivation, if that be not?

As to that Statute which refers to the Causes for which the Rector should be deprived, it doth not refer to a Deprivation in Time of Visitation; but sheweth in what Manner the College shall proceed to get the Rector, if guilty of such Offences, removed: They may complain at any Time to the Visitor, when he is not in his Visitation; and they

may article against him before the Visitor, out of his Visitation: But when he comes to execute his Visitation Power, in the quinquennial Visitation, he is to enquire into all the Affairs of the College; and he is not to proceed in that Case upon the Information of the Fellows, but may proceed even to Depriuation, where ever he seeth Cause.

Contumacy, I take it, is a Cause of Forfeiture of his Office: He is subject to the Power of the Visitor by the Statutes; and if he goes about to evade, or contumaciously refuseth to submit to his Authority, it is an Offence against the Duty of his Place, and a good Cause of Depriuation. So that I do hold in this Case,

First, That the Bishop of Exeter hath a Visitation Power to depriue the Rector, without the Consent of the Senior Fellows.

Secondly, That the Justice of his Sentence is not to be examined into here. And

Thirdly, If it were, and the Cause necessary to be shewn, I think Contumacy is a very good Cause of Depriuation.

I am far from laying an intolerable Yoke upon any one's Neck; but if the Head and Members of a College will receive a Charity, with a Yoke tied to it by the Founder, they must bear it; I cannot sever the Charity from the Yoke; if they will have the one, they must submit to the other.

And so my Opinion is, Judgment ought to be given for the Plaintiff; but my Brothers are all of another Opinion, and I submit to it; the Defendant must have Judgment.

This Judgment was after reversed in the House of Peers.



## U S E S.

Davies *versus* Speed. Hill. 3. Mich. 4 W. & M.

(1.)  
Skin. 351,  
352.

**A** Husband was seised of Lands in Right of his Wife; they join in a Fine, and declare the Uses to the Heirs of the Body of the Husband, begotten on the Body of the Wife; and for want of such Issue, to the right Heirs of the Husband. They had Issue a Son, who died in the Life-time of the Husband and Wife, without Issue; then she died, and afterwards her Husband, without any Issue; and here in Ejectment, if the Lessor of the Plaintiff, who was right Heir of the Husband, or the Defendant, that was Heir to the Wife, should have the Land, was the Question?

Holt C. J. & Cur': Here can be no Estate for Life to the Husband by Implication, because the Estate is the Wife's, to which he is a Stranger. And therefore this Limitation to the Use of the Heirs of the Body of the Husband, &c. is merely void; for taking it as a Remainder, there is no precedent Estate of Freehold to support it; and if you take it as a springing Use, then it is a springing executory Use, to arise after a dying without Issue; which the Law will not allow or expect; so that it is either Way void, and yet must be one of them. If a Man covenant to stand seised to the Use of J. S. and his Heirs, after the Death of J. D. Here he continues seised in Fee, and no Estate is altered during the Life of J. D. and if the Covenantor dies, this shall descend to his Heir: Though if he covenants to stand seised to the Use of the Heirs Males of his Body, because no Descent may be to the Heir after his Death, the Law raises an Estate to him by Implication, and he doth not remain seised in Fee during the Life, but his Estate is immediately put into an Estate-Tail. But in the Case at Bar, there is an express Limitation to the Party; therefore there shall be no Use by Implication, and so the Use to the Heirs Males of the Body is void; and as the first Use is void, so is the second also: For though a Man may limit a future Use upon a Contingent after a Death without Issue, within the Compass of a Life; yet such future Use to take Effect after a Death without

1 Rep. 135,  
130.  
2 Cro. 290.  
3 Cro. 334.  
1 And. 328.  
1 Vent. 272.  
2 Lev. 75.  
4 Leon. 293.  
Moor 349.  
1 Mod. 121,  
159

Issue generally, is so remote a Possibility, that the Law will not admit of it. If in this Case, it had been to the Husband, and the Heirs Males of his Body, Remainder to the right Heirs of the Husband, it had been unquestionably good: And a Feoffment to the Use of another and his Heirs, to commence four Years from thence, is good as a springing Use, and the whole Estate remains in the Feoffor in the mean Time; so it is if it were to commence after the Death of another without Issue, if he die within twenty Years.

And Holt C. J. said, If a Feoffment in Fee is made to the Use of A. and the Heirs of his Body begotten, the Remainder in Fee to the right Heirs of T. S. who is then living, in such Case the Fee-simple is not in the Feoffee; but the Use of the Fee shall result to the Feoffor, and remain in him until the Contingency, viz. the Death of T. S. shall happen.

Judgment was given in this Case for the Defendant.

### Tipping *versus* Colins. Hill. 6 W. 3.

Edward Colins, seised of Lands in Fee, makes a Settlement by Deed and Fine, to the Use of himself and his Heirs, until a Marriage should take Effect, and then to the Use of his Wife during her Life, and then to the Use of the Trustees and their Heirs, during the Life of E. Colins in Trust, to preserve the Contingent Remainders, and that they should permit him to take the Profits; then to the Use of the first, second, third, and every other Son (by that Wife) in Tail, then to the Use of the Heirs Males of his Body, Remainder to the Heirs of his Body, Remainder to him and his Heirs for ever. The Marriage took Effect, E. Colins hath no Issue Male by that Center, but only one Daughter, married to Tipping, and they had Issue Lucretia Tipping, the Lessor of the Plaintiff; but afterwards he had another Daughter by another Center, and then levies a Fine with Warranty; but it was agreed the Warranty had no Effect in this Case, by Reason of Infancy, &c. and that the Estate passed by the Fine was defeated by Entry. And the only Question was, Whether Heirs of his Body be Words of Limitation, or Purchase? And it was adjudged without Difficulty, that the Heirs of the Body take by Purchase, and therefore not barred by the Fine; for here no Use can result to E. Colins, because it is expressly

Carthew  
262.

(2.)  
Com. 312,  
313.

ly limited to the Conusees and their Heirs, during his Life, in which Respect it differs from the Case of Fenwick and Milford, Inst. 22. b. and Pybus and Mitford, 1 Mod. 159. because in those Cases the Party had not limited the Use out of him during his own Life, as here he hath done in express Terms: And it is too remote to imagine that the Trustees, whose Estate is created to support the Remainders, should make a Feoffment to destroy their Estate, whereby to raise an Estate for Life by Implication in the Feoffor; 2 Co. 51. a. And whereas it was objected by Serjeant Wright, that the Trust for E. Colins was executed by the Statute of Uses; for the Use limited to the Trustees is void, and they are in by the Common Law; as where a Man makes a Feoffment to certain Trustees and their Heirs, to the Use of them and their Heirs, in Trust for J. S. this Trust is executed by the Statute.

It was answered by Holt C. J. that in this Case, the Conusees take by the Statute of Uses, because the Limitation of the Use is different from the Estate of the Land; as where a Feoffment is made to the Use of the Feoffee for Life, Remainder to J. S. the Feoffee is in by the Statute. Feoffment to A. and his Heirs, to the Use of A. and B. and his Heirs, and they are Jointenants; the Difference is, that where the last Fee-simple of the Use is limited to him who hath the Estate of the Land, he is in by the Common Law, as in the Case Inst. 22. b. where a Feoffment is to the Use of the Feoffor in Tail, and after to the Use of the Feoffee in Fee. In the Case of Pybus and Mitford, Hale said, that if a Feoffment were made to the Use of the Heirs of the Body of the Feoffor, from and after the Death of J. S. there no Estate for Life would result till after the Death of J. S. He said, that whether Feoffees take by the Common Law, or by the Statute, yet where the Use is once disposed of to them and their Heirs, (whether the Statute executes it or not) there cannot be an Use upon an Use, nor a Trust upon such an Use to be executed by the Statute; Quod nota.

Judicium pro Quer<sup>r</sup>.



Lord Anglesea *versus* Lord Altham. Pasch. 8  
W. 3.

**I**N this Case of a Fine levied, without any Deed to declare the Use thereof, it was held by Holt C. J. that at Common Law the Use was always intended to be to the Feoffee or Conusee, and in Pleading never was averred: But if it be to the Use of the Feoffor or Conusor, then it must be averred. Here the Party is in by the Fine immediately; and the Statute extends not to Uses by Operation of Law, but to such as are to a third Person; and the Conusor or Conusee cannot aver the Fine to be to the Use of a third Person since the Statute. (3.)  
2 Salk. 676.  
Co. Ent. 114.  
Plowd. 477.  
Lutw. 273.  
29 Car. 2.  
c. 3.

And in the Case of Tregame *versus* Fletcher, Holt C. J. held, that where the Uses of a Recovery are declared by Deed precedent, no new or other Use can be averred by Parol, unless there be some Variance between the Deed and the Recovery; and where such Deed is pleaded, if the Party sets up other Uses, he must confess and avoid it: But when the Uses are declared by Deed subsequent, new or other Uses may be averred, without shewing the Deed, though there be no Variance, &c. because there was an intermediate Time, when there might be such Agreement made, and the Uses arise according to it; and here if a subsequent Deed be set up, the other Party may traverse those Uses. 2 Rep. 77.  
1 Sid. 160.  
1 Lev. 113.  
2 Vent. 242.  
Lutw. 273.

Bushell *versus* Burland. Mich. 7 Ann.

**I**N Ejectment, on a Special Verdict, the Case in Sub- stance was this; A. and B. the Wife of A. levied a Fine, and four Years afterwards, they by Deed declare the Uses, in which Deed are these Words, All and every Fine or Fines levied, or to be levied, shall be to the Uses of this Deed. (4)

The Question was, Whether the Uses of the Fine were well and sufficiently declared by this subsequent Deed?

Serjeant Pratt for the Fine and Deed relied on Dowman's Case, 9 Co. and that the Jury find the Deed relates to the Fine before levied.

Hooper contra: The Question is, Whether this subsequent Deed is sufficient to declare the Uses of this precedent Fine?

I shall lay down three Rules.

1st, That no Use of a Fine (since the Statute of Frauds and Perjuries) can be averred by Parol.

2dly, The necessary Consequence thereof is, if a Fine be levied, and the Use cannot be averred by Parol, that then it will go back to the Party that had the Interest before.

3dly, When a Deed is made before or after a Fine is levied, and doth declare to what Uses the Fine shall be, it shall be to such Uses as are declared by the Deed.

As to Dowman's Case, which seems to be against me, that was of a Recovery, and all was within a Month; and it being so little Time, it seemed to be the same Conveyance. But in this Case, there were four Years, and this done by a Feme Covert. That Case was long before the Statute of Frauds and Perjuries; and then an Use might be averred by Parol, but now it cannot. The Reason of that Case, as it is reported in Moor 191. is, because the Deed, which is the Evidence, doth say, that it was the Agreement of all, that the Recovery should be to such Uses; and it is there said, without these Words the Case had been otherwise. Now in this Case, there was no such Thing as an Agreement. The Statute for the Amendment of the Law doth not alter the Statute of Frauds and Perjuries, as to that Part, no Use can be averred by Parol, and therefore that doth still remain good.

Now I am to shew why a subsequent Deed should not be good; and if it should, the Mischiefs that will follow.

A Fine of itself can be no Harm to a Feme Covert, if nothing be done but the Levying thereof; and that is the only Conveyance that she can make. But the Inconvenience is, that though a Feme Covert is privately examined when she levieeth a Fine, (which is useless until there is a Deed to declare the Uses thereof,) yet to that Deed she is not examined; and then in so long a Time as this, the Husband hath a great Opportunity to persuade his Wife.

I desire to know, where was the Freehold between the Levying of the Fine and the Time of Declaring the Uses thereof? And what shall be thought a reasonable Time to execute a Deed to declare the Uses after a Fine levied? All the Cases, where a subsequent Deed may declare the Uses of a Fine, are to be intended where the Uses may be averred. The Freehold must be in him to whose Use the Fine was

was levied. By the Purport of the Deed it appears, that the Intent of the Parties was to have a future Act done, which was, that she should levy a Fine.

Pratt: As to the Objection, that this is the Case of a Feme Covert; when the Wife joineth in a Fine with her Husband, he may make a Deed to declare the Uses thereof, without her Consent. In the Case of Jones and Morley it is held, that a Writing is sufficient to declare the Uses of a Fine, if the Jury find it was delivered to such Uses.

Hooper: If a Fine be levied, and there is no Deed to declare the Uses, but only a Parol Evidence, and the Jury find, that it was levied to Uses according to that Parol Evidence, will that be sufficient?

Powell J. cited Beckwith's Case, 2 Co. 57. and said, that if the Wife join with her Husband in a Fine, and she then will not consent to make a Deed to declare the Uses, then the Husband may declare the Uses without her Consent.

Holt C. J. He may. If a Fine be levied in August, and a Deed to declare the Uses thereof is made at the same Time, by a Man and his Wife, of Lands which he hath in Right of his Wife; the Fine, in Judgment of Law, is a Fine of the precedent Term, and yet the Deed is but a Deed in August; and that Deed is sufficient to declare the Uses.

If a Fine is levied by Husband or Wife, of Lands which he hath in Right of his Wife, and there is a Deed made at the same Time to declare the Uses thereof, and afterwards this Deed is lost, and then another is made to the same Effect, and dated as the first, that Deed is sufficient to declare the Uses of the Fine.

Powell J. If there is, by a subsequent Deed, an Agreement to a precedent Act, then it will take Effect, notwithstanding the Statute of Frauds and Perjuries.

Holt C. J. An Estate for Life without Impeachment of Waste cannot be without Deed; and then how is this Use declared, but by a subsequent Deed?

Gould J. In Arthur Bassett's Case, Dyer 136. pl. 17. there the Case is put, where there were four Years between the Time of Levying of the Fine, and the Time of making the Deed to declare the Uses.

Holt C. J. If there is an Agreement to levy a Fine, and a Fine is levied, and afterwards a subsequent Declaration of Uses, this is good within the Statute of Frauds and Perjuries.



In another Term. Holt C. J. delivered the Opinion of the Court. The Question is, this Deed bearing Date before the Fine levied, and not executed till after, and the Jury having found that the Fine was levied to the Uses therein declared, whether it is sufficient to declare the Uses of the Fine? We are all of Opinion that it is. We think that, notwithstanding the Statute of Frauds and Perjuries, a subsequent Deed is now as good as it was before the Statute. It is doubtful whether that Statute doth extend to Uses, because they are not mentioned there, but only Trusts; notwithstanding we take Trusts and Uses to be the same, in Respect of Trusts in their larger Extent, and so within the Statute of Uses. Here is what the Statute requires, for here is a Writing, and here is a Deed. If you consider Dowman's Case, Moor 191, 192. you will find this to be much stronger; for the Jury there found, that the Deed of Uses was subsequent, and the Question was, whether the Deed was sufficient to declare the Uses? And in that Case it was objected, that there was a Limitation of the Use, without any Impeachment of Waste, which cannot be without Deed.

At the Time of granting of the Reversion there was no Deed; but when the Deed came, and declared the Intent of the Party, then it was a sufficient Manifestation of the Use, and the Intent of the Party. And it is true, Waste could not be punishable without Deed; but when the Deed came, and made good the Use, it was well enough. The Jury here have expressly found, that it was the Intent of the Parties at the Time of levying the Fine, that it should be to those Uses. In Bassett's Case, Dyer 136. pl. 17. there was a Recovery suffered, 16 H. 8. and the Uses were not declared till the 20th; though it was before the Statute, yet it is the same Thing, and that was held a good Declaration of the Uses.

Judgment for the Plaintiff.

Lord Anglesea *versus* Lord Altham. Pasch. 8 Ann.

(5.) UPON an Issue directed out of Chancery, to be tried at Common Law, this Cause came before the Court. The two Questions reserved upon the Trial for the Opinion of the Court were; first, Whether a Copy of a Fine

and Recovery in Ireland, proved by a Witness that was, and is still in Ireland, who was examined by Commission out of Chancery, may be allowed as Evidence here?

The second is, Whether there be a good Tenant to the Præcipe? And this depends upon the Statute of Frauds, viz. whether the Use of a Fine does not result to the Conusor, there being no Deed to declare the Uses thereof; and if so, the Common Recovery is void.

Holt C. J. As to the first Point, these Depositions ought to be allowed to be Evidence. It is true, the Law requires the best Evidence that can be had; but when no other Proof can be had, the Law will allow such as may be.

It is objected, that there might have been better Proof had, this being a Matter of Record; for there might have been one sent over to examine it. In answer to this, there is no legal Compulsion to send a Man into Ireland, to inform himself in order to be made capable of giving Evidence. Indeed, if that Witness was in England, you might have had him at the Trial.

If it be in the same Cause, and between the same Parties, upon an Issue directed out of Chancery, we allow of the Depositions being read every Day, if the Party be sick or beyond Sea; and though this is a Record, yet it makes no Difference, since there is no legal Course to compel any Man to go over to examine it. The Certificate of a Minister of a Marriage beyond Sea was allowed to be Evidence. 2 Cro. 541, 542.

As to the second Point; The first Clause in the Statute of Frauds is general, that all Uses must be manifested by Writing: And if it had stopped here, a Fine or Feoffment had cut off all resulting Uses, though there had been no Consideration.

But the second Clause excepts all Trusts and Confidences that arise or result in Construction of Law; and I take it, that the Conusor is in at Common Law. Was he a Feoffee, it need not to be averred to the Use of the Feoffee, as appears by the Form of Pleading, Coke's Entr. 414, 273. Com. 477. But it must be averred, that it is to the Use of the Feoffor, and that Intent must be proved; as if there is no Consideration, it sheweth that the Use was not intended to the Feoffee.

The Intent here is manifest, for the Conusor being Tenant to the Præcipe, Tenant in Tail coming in as Vouchor admits him as such.

I take it, that the Statute of Frauds does not extend to Uses, unless to a third Person, and not to the Conuſee; the Conuſee hath the Uſe by Operation of Law, and ſo here is a Tenant to the Præcipe. The Law knoweth no Difference between Uſes and Truſts.

Judgment for the Plaintiff by the whole Court.

See Fines and Release.

## U S U R Y.

*Garret verſus Foot.* Trin. 1 W. & M.

(1.)  
Com. 133.

**D**E B C on Bond; the Condition (on Oyer) was to pay ſo much within ſixty Days after the Return of a Ship, or at the End of thirty-fix Months, which ſhall firſt happen, according to Articles of Bottomry. The Defendant pleaded the Statute of Uſury; the Plaintiff replied, Non corrupte agreeatum fuit; to which the Defendant demurred.

Per Curiam: It is not uſurious; for it doth not appear to be for Honey lent or borrowed.

And per Holt C. J. If I covenant to pay 100 l. a year hence, and if I do not pay it, to pay 20 l. it is not Uſury, but only in Nature of a Nomine pœnæ.

Judgment was given for the Plaintiff.

*Maſon verſus Abdy.* Trin. 1 W. & M.

(2.)  
Com. 152,  
126.

**D**E B C on a Bond of 600 l. the Condition was, that whereas the Plaintiff lent 300 l. on an Adventure, on the Life of the Defendant; if therefore the Defendant ſhould at three Months End pay 22 l. Premium, and the 300 l. Principal; or if he ſhould, after the three Months, pay 6 d. for every Pound per Month for the Premium; or if the Plaintiff ſhould die within ſix Months, then the Bond to be void. The Defendant pleads, Quod corrupte agreeatum fuit, for the Loan of 300 l. and Interest to be paid ut ſupra, and that it exceeded the Rate of 6 l. per cent. To which the Plaintiff demurs.



Holt C. J. This is not like a Bottomry-Bond, by Reason of the Danger of the Sea; for they who lend on Bottomry-Bonds, are as Merchants Adventurers: But Dolben said, that it is now usual to put a Clause in these Bottoms, for saving the Principal, wherefore he thought that these Bonds were also usurious.

At another Day, Thompson urging the Hazard the Plaintiff run in this Case; Holt C. J. said, I am of your Opinion Brother Thompson, for you run a great Hazard, not of the Casualty of Death, but of the Loss of your Money; for it is manifestly usurious.

Dolben J. Robert's Case in 2 Cro. is not Usury, for as he runs small Hazard, so he gains small Profit; there are several Cases that this is no Usury.

Eyre J. That this is Usury. Vide 3 Cro. 741. on six Months Hazard.

Holt C. J. Insurance of Life cannot be Usury, because there is no Loan, but a plain Bargain.

Gregory agreed with Eyre, and the Court was ready to give Judgment for the Defendant, but on Thompson's Importunity adjournatur.

### Bartlet *versus* Vinor. Mich. 4 W. & M.

**A**ction of the Case on Assumpsit, &c. in which the Plaintiff declared, That the Defendant, in Consideration that he the Plaintiff would procure 15,000 l. to be lent to another, in the Name of the Defendant, &c. he the Defendant promised to pay to the Plaintiff 600 l. And the Plaintiff avers, that he procured the said Sum to be lent, by W. P. in his Name, by Agreement of the Defendant; and now this Action was brought for the 600 l. (3.) Carthew 251. 252.

On Non Assumpsit pleaded, the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that the Consideration of this Promise was usurious and unlawful, or at least, that it was Brocage, and so prohibited by the last Statute against Usury: But the Court resolved, that this was not usurious, or Brocage, within the Intent of the Statute; for here neither the Borrower nor the Lender was to pay the 600 l. Premium, but a third Person.

And by Holt C. J. If A. owes B. 100 l. who demands his Money, and A. acquaints him, that he hath not the Money ready, but is willing to pay it, if B. can procure the same to be lent by any other Person; and thereupon B. ha-  
ving

Yelv. 87.  
1 Cro. 461.  
2 Roll. 103.  
Style 412.

ving a present Occasion for his Money, contracts with C. that if he will lend A. 100 l. he will give him 10 l. on which C. lends the Money, and thus the Debt is paid to B. This is a good and lawful Contract between these Two, for B. hath Benefit by it.

Judgment was given for the Plaintiff.

Barneſ *versus* Tompkins. Pasch. 5 W. & M.

(4.)  
Skin. 348.

**I**N Action of Debt upon a Bond, the Defendant pleads the Statute of Usury, and that it was upon an usurious Contract, &c. It appear'd by the Evidence, that the Plaintiff's Wife used to lend Money to be paid by the Week; and that she lent 20 l. to the Defendant, to be paid 20 s. a Week, and one Shilling and six Pence by the Week for Interest; and the Defendant paid the Interest amounting to 30 s. when the Money was lent, which the Wife exacted and received.

Holt C. J. This is an usurious Contract by the Husband, sufficient to discharge and avoid the Obligation in a Civil Action, but not enough to charge the Husband criminally: And it was found for the Defendant.

1 Lutw. 273.  
1 Vent. 198.

Action of Debt doth not lie for Interest Money, tho' the Borrower promises Payment with Interest; but it is to be recovered in Damages in an Action on the Case.

## Wager of Law.

Mood *versus* Lord Mayor of London. Anno  
1 Ann.

(1.)  
2 Salk. 683,  
684.

**I**N Debt for the Penalty of a By-Law, the Defendant waged his Law, and it was over-ruled in the Court of the Lord Mayor; whereupon a Commission of Error was sued out before the Chief Justice and other Commissioners.

Holt C. J. No Wager of Law ought to be allowed in this Case; for the Debt is founded on a Wrong of the  
1 Party,

Party, in not submitting to the Order of the Government of the Corporation. By the Common Law, if a Contract were secret and wanted Witnesses, it was a Privilege on the Plaintiff's Side as well as the Defendant's, to wage Law; because where the Matter was secret, the Plaintiff might put the Defendant to his Oath: And this appears by Magna Charta; before which Statute, the Plaintiff, on his Declaration upon bare Affirmance, could make the Defendant swear there was nothing due. At this Day, no Wager of Law lies but where the Debt arises from a simple Contract that is secret, and not when the Action is grounded on any Thing which is notorious: So that for Debt on a Lease Parol, the Defendant cannot wage his Law; for his Occupation is notorious, and it favours of the Realty; and so it is in Account against a Bailiff for the same Reason, his Management and Translation being notorious. In Action of Account, if the Receipt was by the Defendant, as Receiver, he may wage; not if it be by the Hands of a third Person: 'Tis true, the Law is otherwise in Detinue on a Bailment, for tho' that be by the Hands of a third Person, the Defendant may wage his Law; but there the Bailment is not traversable, only the Detainer, for that is the Point of the Action, and the Redelivery might be private. In Debt for an Amercement in a Court-Baron, a Defendant may wage Law; the Reason is, because the Matter is of small Value which concerns the Lord only, and may be transacted without his Knowledge: But in Action of Debt on a Judgment in such Court, the Defendant cannot wage his Law; for the Judgment could not be but by Confession or Verdict, which the Defendant cannot by his bare Oath falsify; and the Authorities to the contrary are not Law.

1 Show. 79.  
3 Keb. 337.  
2 Lev. 142.  
1 Lev. 15.  
2 Vent. 171.  
1 Cro. 790.  
2 Mod. 140.  
9 H. 3. c. 28.



## W I L L S.

Lee *versus* Libb. Mich. 1 W. & M.

(1.)  
Com. 174,  
175.  
3 Mod. 262.  
1 Show. 68.

**E** Testament. Special Verdict. A. seised in Fee (tali die) made his Will in Writing, by which he devised the Lands in Question to the Defendant, and seal'd and publish'd this Will in the Presence of two Witnesses only, and these two Witnesses only subscribed in his Presence; a Year after he caused to be made another Writing, which recited that he had made his Will, and confirms it in all Things, only by this Codicil 'twas said, (and my Will is, That this Codicil be taken to be of Force, and Part of my Will). And 'twas found that the Codicil was signed by two Witnesses, one of which was a Witness to the former Will, the other a new one, not Witness to the former Will; and 'twas further found, that this Codicil was distinct, and not annexed to the former Will.

The Chief Justice delibered the Opinion of the Court, viz. That it was not a good Will within the Statute; for the Words of the Statute are, (signed by the Devisor, and attested by three Witnesses in the Presence of the Devisor) and here Wants the Attesting by three Witnesses, according to the Act. The Codicil will not carry the Land without the Will, nor the Will without the Codicil: And the three Witnesses within the Statute ought to be Witnesses to the Whole.

Sir Marmaduke Dayrell *versus* Glascock. Hill.  
5 W. & M.

(2.)  
Skinn. 413.

**A**t a Trial at Bar, That where there are three Witnesses to a Will, this is sufficient within the Statute of Frauds and Perjuries, tho' upon the Trial one of them will not swear that he saw the Testator seal and publish his Will: For otherwise it would be in the Power of a third Person, to defeat the Will of the Deceased; and therefore if it be proved

ved to be his Hand, and that he set it as a Witness to the Will, 'tis sufficient to satisfy the Statute in this Case. 29 Car. 2.  
c. 3.

Fisher *versus* Nicholls. Hill. 12 W. 3.

**T**HE Construction of Wills is more favoured in Law (3.)  
to fulfil the Intent of the Testator, than any Deed 3 Salk. 127.  
or Conveyance executed by him in his Life-time: Therefore  
where a Man by Will gives Land to J. S. and his Assigns  
for ever, this is an Estate in Fee; but in a Deed, 'tis on-  
ly an Estate for Life: So a Gift to J. S. and his Heirs  
Male by Will, makes an Estate-tail; but by Deed it is a  
Fee-simple: And a Devise to the eldest Son and his Heirs,  
after the Death of the Wife of the Testator, is an Estate Cro. Car. 366.  
Jones 343.  
for Life to the Wife by Implication; but 'tis not so in a  
Deed.

And by Holt C. J. The Reason of this Diversity is not  
only, for that the Testator is intended to be inops Consilii,  
but because a Will is not a Common Law Conveyance,  
but by the Statute; 'tis true, there were Wills before the  
Statute of Hen. 8. but those were not by the Common  
Law, but by Custom, as in Case of Burgage Lands: 32 H. 8.  
34 & 35 H. 8.  
c. 5.  
Now as Custom enabled Hen to dispose of their Estates in  
this Manner, contrary to the Common Law; so it exempted  
this Kind of Conveyance from the Regularity and Proprie-  
ty requisite in those Conveyances; and by this Means it  
came to pass, that Wills by Statute, in Imitation of those  
by Custom, gained such favourable Constructions.

At Common Law, a Man could not devise by Will the  
Lands which he had by Descent; indeed he might devise  
Lands which he held for a Term of Years, because such an  
Estate is of little Regard in the Law; but not Land of  
which he had the Fee-simple, in Possession or Reversion:  
Yet in certain Borough Towns, the Inhabitants might  
devise the Houses and Lands which they held by Descent;  
and this was a Privilege which they claimed by the Cu-  
stom of those Places. By the Common Law, if a Man  
seised of Lands in Fee, had generally devised the same by  
Testament, the Will was void: But by Stat. 3 Nelf. Abr  
550.  
3 Rep 50  
32 H. 8. All Persons having a sole Estate in Fee-simple, of any  
Lands, Tenements, &c. may give and devise the same by  
Last Will and Testament, at their Free Will and Plea-  
sure; and one seised in Coparcenary, or as Tenant in  
Common, in Fee-simple, of any Lands, may by Will de-  
vise

wise them by this Statute; but Lands entail'd are not devisible, only Fee-simple Lands, and Goods and Chattels; and Wills made by Infants, Feme Coverts, Ideots, Persons of Non-sane Memory, &c. are void.

Mod. Cases  
26.

Per Holt C. J. If Honey be devised out of Lands, the Devisee may have Debt against the Owner of the Land for the Honey, upon the Statute of 32 H. 8. of Wills; for where-ever a Statute enacts any Thing, for the Advantage of any Persons, they shall have Remedy to recover the Advantage given them; and the Action must be against the Tenant. Where Wills appoint a Guardianship of a Child, upon the Statute of Car. 2. they cannot be proved in the Ecclesiastical Court; neither can Wills be proved there for Lands, but of Goods and Lands they may.

1 Vent. 207.

*Cole versus Rawlinson.* Hill. 1 Ann.

(4.)  
2 Salk. 234,  
235.

ONE B. being seised in Fee of a House called the Bell, made a Settlement thereof to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his Son in Tail, Remainder to his Wife in Fee, &c. The Husband died, and the Wife being seised of the said House, and possessed of other Leasehold Estates made her Will, and thereby devised thus: I give, ratify and confirm all my Estate, Right, Title and Interest, which I now have, and all the Term and Terms of Years which I now have, or may have in my Power to dispose of after my Death, in whatever I hold by Lease from Sir J. F. and also the House called the Bell-Tavern to J. B. who was the Son and Heir of him that made the Settlement, and had the Remainder in Tail, &c. This was found by Special Verdict in Ejectment; and the Question was, what Estate J. B. took in the House by this Devise? Three of the Judges held, that he took an Estate in Fee; because 'tis but one Sentence coupled by the Words and also, and this was the Intent of the Testator.

Holt C. J. I am of a contrary Opinion, for the Intent of the Testator will not do, if there be not sufficient Words in the Will to manifest that Intent; neither is that to be collected from the Circumstances of the Testator's Estate, and other Matters collateral and foreign to the Will, but from the Words and Tenor of the Will it self: And if we once travel into the Affairs of the Testator, and leave the Will, we shall not know his Mind, by his Words, but his Circumstances; and then how shall the Law expound it?



Upon the Will it appears to be so; but by the Matter found in the Special Verdict it is otherwise; and what if more accidental Circumstances be discovered, and made the Matter of another Verdict? Mens Rights will be very precarious upon such Construction, if we depart from the Will to find the Meaning of it in Things out of it. 'Tis a certain Rule, that to devise Lands to J. S. without further Words, will pass but an Estate for Life, unless there be other Words to shew the Testator's Intent, as for ever; or except he devise the Lands for some special Purpose, which cannot be accomplished without a larger Estate: And as this is a sure Rule, so it holds good as well where the Devise is of a Reversion, as when 'tis of Lands in Possession, if it be not devised particularly as a Reversion, or he do not take Notice of a particular Estate, whereby his Intent may appear: But 'tis otherwise, if the Words are general, and without regard to the Nature of the Thing; for it shall not be construed from the Nature of a Thing which is extrinsecal, but from the Words of the Will. The Case cited in Moor and Hobart differs from this; for there the Testator takes Notice of a precedent Term, and the Words are, His Lands of Inheritance, so that the special Intent of the Testator is apparent by the Words of the Will: And if I give Black-acre to A. and his Heirs, and also White-acre, the Fee-simple of both shall pass, as well of White-acre as the other, because it follows the Limitation; but in Case I give all my Right, Title and Interest in my Term, and also my House called the Bell, in the grammatical Construction 'tis no more, than and I also give my House called the Bell; for the subject Matter of his Right, Title and Interest is the Term, and the Preposition in terminates and rests there. So is the Case here; but say my Brothers, turn it into Latin, and then 'tis, I give jus, titulum & statum in Termino ac etiam Domo vocat' the Bell-Tavern. To this I answer the Preposition in may be necessarily understood in Latin, but not in English; and the Conjunction is not so far a Copulative as to take in this Preposition, tho' it takes in the Verb. My Brother Powel would transpose the Words, so that it shall be all the Right, Title and Interest in the Bell, and also all the Term I have and hold of Sir J. F. But I do not know how we can transpose Words that are good Sense: If the Will was Nonsense, then we might transpose to make it bear a Meaning; but to displace the Words of a Will when they

Moor 873.  
Hob. 3.  
1 Roll. 844.  
Vent. 359.  
3 Bulst. 129.  
3 Cro. 330.  
1 Cro. 465.  
2 Sid. 151.

are intelligible, is to alter the Will and the Sense of it ; for these Reasons, I conclude for the Plaintiff.

Bunker *versus* Cooke. Mich. 6 Ann.

(5.)  
Fitzgibb. 225,  
226, &c.

**I**N Testament there was a Special Verdict; wherein the Jury find that William Bockenham Esq; being Commander of one of his Majesty's Ships, on the 3d of May, 1692. made his Last Will and Testament in Writing, in these Words; I do hereby give and bequeath to my Wife, Frances Bockenham, (the Lessor of the Plaintiff) all such Sum or Sums of Money, which now is or shall become due from his Majesty, for my own and Servants Wages; and all such Sums of Money, Lands, Tenements, Goods, Chattels and Estate whatsoever, wherewith at the Time of my Decease I shall be possessed of, or which shall belong to me, &c. Then they find that the Testator, at the Time of making his Will, was not seised of any Lands; but afterwards by Deeds of Lease and Release, dated in March, 1700. G. W. and others being seised of the Lands mentioned in the Declaration, conveyed the same to the said Testator, and his Heirs, by Virtue whereof he became seised; and sometime after the said William Bockenham died, and the Devisee entered upon the Lands which were held in Socage and of the Nature of Gavelkind, and the Heir at Law enters upon her: And so here the Question is, if those Lands afterwards purchased do pass, and are disposed of by the Testator, or not?

Holt C. J. Giving the Opinion of the Court: We have considered of this Case all together, and we are all of Opinion, that the Will as to these Lands is void, and the Lands do not pass thereby, but that Judgment ought to be for the Heir at Law. We agree, that the Words of the Will are full and comprehensive to pass all these Lands, had the Testator been seised of them at the Time of making his Will, and perhaps it might be his Intention to have them pass: But the Case is no more than this; A Man makes his Will, and devises all the Lands that he shall have at the Time of his Death, and after that he purchases Lands, and dies without Republication: We hold that it is a void Devise; for a Man cannot give any Lands, but what he has at the Time of making his Will; he cannot devise that which he hath not, and the Statute

only empowers Men having Lands to devise them, so that if the Devisor has nothing in the Lands, he is out of the Statute. Here is no Act between the Making of the Will and the Death of the Testator, necessary to be done, to make this a perfect and compleat Will; no Writing, no Publication, nor any other Thing whatsoever; it is subject indeed to a Revocation during the Testator's Life, and is to take Effect only from the Time of his Death; but it is a Will, and Disposition of the Estate bequeathed from the Time of Making thereof: And where there is a Disability in the Testator at the Time of Making the Will, tho' that Disability be actually removed before his Death; yet the Will will be absolutely void, because he had no Ability at that Time. Suppose an Infant makes a Will, and devises Lands during his Minority, or a Feme Covert in the Life of her Husband; altho' the Infancy or Coverture be afterwards removed, if either of the Devisors die, without new Making or Publication of their Will, it is a void Will, because of their original Disability, tho' they should live many Years after; for Removing these Disabilities will not do without a new Publication, or making a new Will: Now these are only personal Disabilities, but this is a real One; he had nothing in this Case to give or dispose of, then here is a Removal of a Real Disability, and shall that be of more Effect, to make it a good Will, than Removal of a personal Disability? No surely it shall not. I would fain know what Commencement this Will has, as to these Lands: It cannot commence from the Time of Making the Will, because the Testator had not the Estate at that Time; when then would you have this to be a Will, must you stay till he has purchased to make it so? But consider the Act of Purchasing the Lands, and his Disposing of them, are two different Things, and of different Natures; and you must suppose that the Instant he purchases he makes his Will, and not before, which is absurd and repugnant. The Law of England is plain as to this Point by all Precedents; and the Law is the same of Lands devised by Custom, as well as by Statute: There is no Will that I can find, by any Entry of the Pleadings, but it is said the Testator was seized in Fee, and being so seized he made his Will; and of this there are Multitudes of Authorities: And tho' the Forms of Pleadings do not make the Law, yet the constant Pleading of a Thing in such a Manner, is great Evidence of the Law; and this argues the Necessity of the Testator being seized at the Time of Making

3 Rep. 31.  
1 Inst. 112.  
6 Rep. 18.

4 Rep.  
Co. Ent. 602,  
664.  
Rast. 274.  
24 H. 6. 6.  
Gouldsb. 93.  
March 137.  
1 Sid. 162.  
Plowd. 343.  
34 H. 6.  
F. N. B. 199.  
Fitz. Dev. 17.  
Bro. 15.



38 H. 6. 27.  
19 H. 6. 17.  
3 Rep. 31.  
Dyer.

**Making the Will.** It is true, a Personal Estate and Chattels may be given and disposed of at Common Law, before the Testator has purchased, or had Possession of them, and there are many Cases that make out this; but there is a great Deal of Difference here between a Real and Personal Estate; for a Personal Estate and Chattels are transient and fleeting, and not at all fixed and permanent as Lands are; perhaps the greatest Part of a Man's Estate is in Goods to Day, and he may have a Mind to turn these into Money to morrow, or the Necessity of Dealing and Traffick in the World may absolutely require it: And then would it not be hard, that a Man should be obliged to make a new Will every Day, which he must do, if he could not dispose of his Chattels, because they have undergone some Alteration; this would be the greatest Perplexity imaginable. But on the other hand, Land continues the same every Day, and will so always to the End of the World; and as to Real Estates, there is Time and Opportunity to make Settlements of them when a Man thinks fit; but as to a personal Estate, that is under constant Variation: Besides, Personal Things go to the Executors, and the Legacy passes not by the Will, but by the Assent of the Executors to whom the Will is only directory, so that the Legatee is in by them; and this is enough to shew the Difference between a Real and a Personal Estate. To make a Will take Effect from the Purchase of the Estate, is contrary to the Nature of a Purchase; for the Will gives it to another and his Heirs, and the Purchase gives it to himself and his Heirs: And it is to be noted, that here is no Republication of the Will; for if there had been a Republication, that would have made these Lands pass; provided that all the Requisites and Circumstances necessary to the Making an original Will, within the Act of Frauds and Perjuries, had been observed. If a Man devises Land by Will, and is disseised after that, and then dies, this Devise is void, and cannot be made good; and the Reason is, because the Disseisin turns it to a Right, and 'tis then only a Chose in Action: But in Case a Man is disseised, and then makes his Will, and devises the Lands, if he do afterwards re-enter, the Land shall pass; for such Re-entry purges the Disseisin, and by Relation he is in Possession to all Intents from the Beginning, wherefore he shall have an Action for the mean Profits between the Time of the Disseisin and bringing the Action: He may in that Case be justly said to be seised in Fee of such Lands,

and

and therefore may dispose and devise the same away, because the Re-entry reverts the Estate. We will suppose an Heir that has nothing, but a bare Expectation during his Father's Life-time, should make a Will, and devise all his Lands that he should have at the Time of his Death, would the Land, which came to him by Descent from his Father, pass by the Devise? No surely: Though if a Man makes his Will of Lands in Reversion, expectant on an Estate-tail, or Estate for Life, and before his Death Tenant for Life, or Tenant in Tail, dies without Issue; there those Lands will pass, altho' he had but a Reversion only at the Time of Making the Will, because he is seised at that Time as much as he can be; and it is a certain present Interest, tho' to commence in futuro. I look upon it to be my Lord Coke's Opinion in Butler and Baker's Case, 3 Rep. That a Devise is a Disposition; and that Case was adjudged in the Exchequer-Chamber by all the Judges in England: Therefore for these Reasons, I hold that Judgment ought to be given for the Defendant. First, In regard it is a Will at the Time of the Making. Secondly, In as much as the Testator had not Power to give and dispose what he had not. Thirdly, The constant Manner of Pleading shews the Necessity of the Testator's being seised. Fourthly, A Devise of Lands is not to be resembled to a Devise of Personal Estate, because a Personal Estate is altering every Day. Fifthly, Because the Devise is repugnant to the Nature of the Purchase; and for that there is no Case, nor Authority in Law, to warrant a contrary Opinion. For though it is said in the Year-Book 39 H. 6. where another Point is determined, that suppose a Man, after making his Will, should purchase Lands; there is no Resolution to that, but only a Quare: Indeed I was very inclinable to make this a good Devise, because the Intent is strong, and that will weigh a great Deal in a Will; but when I considered more of it, I could find nothing to favour it. I do not give my Opinion so much on the Word having in the Statute of Wills, but that at the Time of Making the Will he had not the Lands; and 'tis so agreed by Dyer, that a Man must be Owner of the Land at that Time.

Powel J. I would have made it good, if I could, but it is very inconvenient it should be so; for when a Person is beyond Sea, or in foreign Parts, or in Prison, and should make his Will in this Manner, he may have many Thousands a Year descend to him from other Relations,

that he might know nothing of at the Time of Making the Will.

Per Cur': Judgment was given for the Defendant: And that Judgment was affirmed in the House of Lords.

*In the Case of Arthur versus Bockenham.*

(6.)

**B**<sup>y</sup> Trevor C. J. of C. B. I do agree, that Devises of Land have not been subject to the strict Rules of Construction of Conveyances at Common Law, because the Law favours Dispositions by Wills, to make them agreeable to the Intent of the Testator; whereas Conveyances by the Common Law stand upon a different Foot: But then this is grounded on a Supposition, that the Testator has wherewithal to make Disposition of. Let us then consider, how the Law makes Construction in what comes nearest to Wills, and that is in Conveyances of Land to Uses, which the Statute 27 H. 8. hath executed into Possession; the Rules of Construction in these Cases are the most proper to be adapted to Wills: And as Wills have been all along construed according to the Intent, so has the Law always supported these Conveyances to Uses, on the supposed Intention of the Party, to supply little Defects which may be in them. Now by Conveyance to Uses at Common Law, could any one convey a Use in Land, which he had not at the Time of the Conveyance? No he could not; and that is plainly proved by a Case cited at the Bar, of Yelverton and Yelverton: There the Father covenanted to stand seised of Land, which he should afterwards purchase; to the Use of himself for Life, and afterwards to the Use of his youngest Son and his Heirs, and after he purchased Land and died; and the Question was, whether the eldest or the youngest Son should take? And it was resolved, that no Use could arise to the youngest Son, being of Land the Father had not at the Time of Making the Conveyance; and that is grounded upon very good Reason, because he cannot raise a Use of Land which is not his own: For if a Man, that has no Right to the Land, can raise a Use of that Land, then two Persons at the same Time might raise Uses; for it cannot be denied, that he who is Owner of the Land, may dispose of it or raise what Uses he pleases, he being the proper Person on a Sale, to declare the Uses: And it is impossible the same Lands should be to the Purchaser for Life, with Remainder to his youngest

3 Cro. 401.  
27 H. 8. c. 10.  
10 Rep. 85.



youngest Son and his Heirs, and at the same Time should be to him and his Heirs; these would be contradictory Uses, being at one and the same Time, and declared by different Persons. It is allowable indeed by Law, for a Man to covenant that he will purchase Lands by such a Time, and to levy a Fine thereof, and the same shall be and enure to such and such Uses: But the Reason of that is, when the same Lands are purchased and Fine levied, the Use arises on the Fine, and not on the Deed made by the Party; and therefore he was Owner of the Land: And tho' he could not declare the Use before he had the Land, yet the Fine raises the Use; and the Deed made before, is only an Evidence of his Intention, that it should be to such Uses, if no Uses were declared at the Time of Levying the Fine, for at that Time he might declare other Uses; but no other Use being declared, that Deed serves as an Evidence of the Intention of the Party, no other Intent appearing. To apply that, to this Case; here is a Conveyance made by a Person whereby Lands are disposed, which he had not at the Time of Making the Will, and is a Disposition to take Effect in futuro; and so was that Case, a Grant and Disposition of Land when he should purchase it: Therefore this Will cannot be a present Disposition of what he had not, but a Declaration how the Land should go at his Death; but 'tis very plain, the Making of the Will is the very Foundation, and an instant Disposition; so that, if the Devisor has not the Land at the Time, it will not pass.

This short Note from the Argument of Lord Trevor is here inserted, further to illustrate the Opinion of the Lord Chief Justice Holt in the preceding Case.

See Estate.

## W I T N E S S E S.

Shotter *versus* Friend. Hill. 2 W. & M.

( 1. )  
 Carthew 142,  
 144.  
 1 Show. 158,  
 172.

**T**HE Plaintiff in a Prohibition to the Spiritual Court declared, that J. F. made his Last Will, and bequeathed a Legacy of 10 l. to M. F. and made Shotter's Wife Executrix, &c. The Plaintiff paid the Legacy to M. F. who afterwards died Intestate; then the Defendant as her Administrator libelled for this Legacy; to which the Plaintiff alledged by Way of Plea in that Court, that he had paid the said Legacy to M. F. in her Life-time, which Payment he offered to prove by one Witness; but the Court refused the Plea, because one Witness is not sufficient by their Law to prove any Matter of Fact.

4 Rep. 301.  
 F. N. B. 97.  
 33 H. 6. 8.  
 5 Inst. 20.  
 7 W. 3. c. 3.

Holt C. J. This is a Temporal Matter, and then they ought to go according to our Law; and it is not necessary in any Case at Common Law, that a Proof of Matter of Fact should be made by more than one Witness: For a single Testimony of one credible Witness is sufficient to prove any Fact; and he held, that the Authorities cited in 1 Inst. 6. did not warrant that Opinion, which was there founded on them. The Common Law requires no certain Number of Witnesses; tho' they are required by Statute in some Cases; as for Treason, there must be two Witnesses to the same overt Act, &c. In all other criminal Matters, one Evidence is enough; and to a Jury one single Witness is sufficient.

The King *versus* Lord Preston. Mich. 3 W. & M.

( 2. )  
 1 Salk. 278.

**L**ORD Preston being committed by the Quarter-Sessions, for refusing to be sworn to give Evidence to the Grand Jury on an Indictment of High Treason, was brought by Habeas Corpus in B. R.

Holt C. J. said, It was a great Contempt, and that had he been there, he would have fined him, and committed him till he paid the Fine; but being otherwise he was bailed.

Anonymus. Mich. 5 W. & M.

UPON Capture of a Prize, one Part was agreed to (3.)  
belong to the Master, and the other two Parts to Skin. 403.  
the Owners; the Master disposeth of One hundred Chests  
of Lemons to A. B. to be sold, they being bona peritura,  
and after brought an Action of Account against A. B. and  
upon Evidence at Guildhall, a Mariner was allowed to be  
sworn, tho' it appeared that he was to have a Share of the  
third Part of the Master; for per Holt C. J. The Master  
is accountable to the Mariners for their Share, which they  
shall recover of the Master, whether he recovers in the Ac-  
tion, or no.

The King *versus* Crosby. Hill. 6 W. & M.

CROSBY was indicted for High Treason, and at a Trial (4.)  
at War, Aaron Smith was ready to give Evidence 5 Mod. 15.  
against him; the Prisoner produced the Record of Smith's S. C. 2 Salks  
Conviction, and Judgment to stand in the Pillory, and he 461, 689, and  
had stood in it; which his Counsel objected made him infa- lb. 513, 514.  
mous, and disabled him to be a Witness. 3 Lev. 426,  
427.

Ward, Attorney General: This does not take away his  
Evidence; the Cause for which he was convicted was only  
giving Instructions to Stephen Colledge, to be used by him  
at his Trial; but there was no Publication of them, and  
it was not a Cause that deserved the Pillory.

Holt C. J. It is the infamous Punishment, and not the  
Cause. If one is convicted of Perjury, and stands in the  
Pillory for it, if he gets a Patent of Pardon, it does not  
restore him to his *Liberam Legem*. Here has been a Gene-  
ral Pardon; the Pardon does not revive his old Credit,  
but it gives him a new one. I will not give any Opinion  
now as to the first Point, Whether he had been a good E-  
vidence without a Pardon? But I take it, that the Gene-  
ral Pardon makes him a good One, and has taken off the  
Disability; for it not only takes away the Crime, but the  
Disability too: He was allowed to give Evidence, but the  
Jury acquitted Crosby.



*At the Sitting in Middlesex, coram Holt C. J.*  
13 Junii, 1695.

(5.)  
Com. 340.

**I**Ndebitatus Assumpsit was brought against a Holder of Stakes (upon a Wager of a Foot Race): The Defendant would give Evidence that he paid it to the Winner; then the Plaintiff shews the Defendant had Notice that it was a Cheat; for it was agreed, that without such Notice the Action lies not. Then one was offered as a Witness, who had betted of the same Race.

Holt C. J. I remember a Trial at Bar, where Oath was made, that one, who was produced as a Witness, had laid a Wager about the Verits of the Cause; yet it was said that a Witness cannot, by any Act of his own, deprive the Party of his Evidence: But presently afterwards he said, it influenceth his Testimony very much; whereupon the Witness was examined upon a Voyer dire; and denied that he got or lost; and then examined as to the Principal Matter.

Then one produced as a Witness was charged upon Oath with Subornation of Perjury; yet he was admitted a Witness; for such a Charge goeth only to his Credit; and he shall be permitted to answer it; otherwise if he were convicted.

*Barlow versus Vowell. Trin. 7 W. 3.*

(6.)  
Skin. 586.

**A**T Nisi prius in Middlesex, ruled per Holt C. J. That where a Man makes himself a Party in Interest, after a Plaintiff or Defendant has an Interest in his Testimony; he may not by this deprive the Plaintiff or Defendant of the Benefit of his Testimony; as if a Man be Witness of a Wager, &c. and after bet.

*The King versus Davis and Carter. Mich. 7 W. 3.*

(7.)  
5 Mod. 74,  
75.

**T**HE Defendants being convicted for forging a Bank Bill, and having stood in the Pillory for it, were now brought up to the King's Bench, and pray'd that they might be turned over to the Marshalsea, because the Sheriff of L. oppressed them in Newgate, where they were detained

till they paid the Fine, &c. and their own Affidavits were offered to prove the Oppression.

Holt C. J. If a Man has had an infamous Judgment, and stood on the Pillory for an Offence, which is contrary to the Faith, Credit, and Trust of Mankind, as Forgery is, he is disabled to be a Witness in any Cause: And Lord Hale saith, if he has stood in the Pillory, he cannot be a Witness; but that is to be understood of an infamous Judgment, and where a Man is convicted for a Libel, and has stood on the Pillory for it, yet he may be a Witness. In this Case the Affidavits were not read; but the last Day of Term the Court ordered the Sheriffs to return Money which they had taken from them; and remanded them to Newgate.

1 Inst. 6. \*  
H. P. C. 263.  
3 Lev. 426,  
427.

In a like Case, it being objected against reading the Affidavit of a Person, Holt C. J. said; Must he therefore suffer all Injuries, and have no way to help himself?

2 Salk. 461.

It has been held, that Witnesses may be examined before a Judge, by Leave of the Court, as well in Criminal Causes as in Civil, where a sufficient Reason appears; as when they are going to Sea, &c. and then the other Side may cross examine them.

Comber. 55.

### The King *versus* Whiting. Mich. 10 W. 3.

**I**n an Information for a Cheat, the Fact appeared to be, (8.) That the Defendant had a Promise of a Note for 5 l. from his Mother in Law; and by some Slight got her Hand to a Note of 100 l.

1 Salk. 283.

Et per Holt C. J. The Mother cannot be a Witness, being concerned in the Consequence of the Suit, which is a Means to discharge her of the 100 l. for tho' the Verdict upon this Information cannot be given in Evidence in an Action upon the Note for the 100 l. yet we are sure to hear of it to influence the Jury.

1 Salk. 286,  
287.  
1 Lill. 547.  
Raym. 191.  
Hob. 91.

Per Holt C. J. at Nisi prius. I have known it ruled, that a Legatee should not be a Witness to prove Assets in the Hands of an Executor in Debt by a Creditor; and it has been an old Exception, but I see not the Reason of it, for he swears to lessen the Assets; and one Creditor may be a Witness to prove Assets in an Action by another Creditor. And the Legatee was sworn.

Pasch. 12 W. 3.  
Cases W. 3.  
385.

The King *versus* Hord. Mich. 12 W. 3.

(9.)  
2 Salk. 690.  
2 Salk. 513,  
514, 689.

It was objected, that a Witness was convict of Barretery, and the Record produced, & allocatur, tho' he was not adjudged to the Pillory. It was insisted, that he was pardoned by the late general Pardon.

6 Mod. 168.  
1 Hawk. P.C.  
cap. 69.

Holt C. J. If one be convict of Perjury, upon the Statute, he cannot be restored to his Credit by the King's Pardon; for by the Statute 'tis Part of the Judgment that he be infamous, and lose the Credit of Testimony; but he may by a Statute pardon. But in other Cases where the Infamy is only the Consequence of the Judgment, the King's Pardon may restore the Party to his Testimony. Held upon a Trial at Bar.

Martyn *versus* Hendrickson. Hill. 2 Ann.

(10.)  
1 Salk. 287.

CASE for managing the Defendant's Ship so negligently, that it ran over the Plaintiff's Barge. The Declaration set forth, that he was possessed of the said Barge, laden with divers Goods and Merchandizes. And first, Holt C. J. would not suffer the Pilot to be a Witness, because he was answerable, if faulty in steering, to the Master. Secondly, he would not suffer any Damages to be recovered for the Goods, because not set forth particularly.

1 Salk. 283.

Clerk *versus* Dealy. Pasch. 3 Ann.

(11.)  
6 Mod. 151.

Plaintiff as Executor brought Indebitatus for Money of the Testator, received after his Death, to the Plaintiff's Use, and produced the Testator's Debtor, who paid it, as a Witness, but he was rejected.

1 Salk. 27,  
28.  
Vide 1 Salk.  
283, 285,  
286, 287.

Per Holt C. J. For the Plaintiff, by bringing this Action, determines the Election he had of suing the original Debtor, or the Receiver, and allows of the Payment; but if he be nonsuited, the Matter is at large again, and he may sue the Debtor; and therefore the Debtor swears to discharge himself, and by Consequence is no Witness.



It appeared also that another Sum of Money, mentioned in the Declaration, was found by the Defendant in the Testator's Room after his Death, which he took.

And per Holt C. J. As to that the Plaintiff mistook his Action, for he should have brought Trover, and not an Indebit. for Money received to his Use. And the Plaintiff was nonsuited.

Needham *versus* Smith. Mich. 1704.

**U**PON an Appeal from the Rolls, it was objected to the Evidence of one Norris, a Witness examined in the Cause, and read at the Hearing at the Rolls, that since that Hearing, in Answer to a Bill exhibited against him, he had confessed that on the Day on which he was examined as a Witness, he took a Bond of the Plaintiff, that if the Plaintiff recovered the Estate in Question, he would convey Part of it to the said Norris. (12.) Vern. 463, &c.

The Question now was, whether that Answer should be now read to take off his Evidence? And the Lord Keeper, assisted with the Lord Chief Justice Holt, and Justice Powel, were all of Opinion that the Answer ought to be read.

Anonymus coram Holt C. 7. At Nisi prius.

**I**N Trover for Money, the Case was, That the Plaintiff's Son had a general Authority from his Father to receive and pay his Father's Money. The Son took a Bill for Money due to his Father, and received it without a particular Authority for that Purpose, and this with an Intent to imbezil it; but he gave a Receipt as for Money had to his Father's Use; this Money was given to the Defendant. The Questions were, First, If the Son could be a Witness to prove the Delivery. And 2ly, Whether the Father could maintain this Action? (13.) 1 Salk. 289.

Holt C. J. was of Opinion, that the Son might be admitted as a good Witness, his Testimony being corroborated by other Circumstances, and that the Action was maintainable. According to this Opinion the Plaintiff had a Verdict. 1 Sid. 437. Far. 129. Mod. Caf. 301, 311. 1 Mod. 30. 1 Lev. 282. Mod. Caf. 291.

## W O M E N.

Dominus Rex *versus* Pigot. Pasch. 13 W. 3.Cases W. 3.  
516.

**H**E was convicted upon an Indictment for Misdemeanor in attempting forcibly to carry away one Mrs. Hescot, a Woman of great Fortune.

Holt C. J. Sure this concerns all the People in England that would dispose of their Children well; and he was fined 200 Marks, and the Lady's Maid, who was privy to the Contrivance, was fined 20 Marks, and to go to all the Courts with a Paper upon her, with her Offence writ in large Characters.

## W R E C K.

Wiggan *versus* Branchwaite. Hill. 10 W. 3.Cases W. 3.  
259.

**T**HE Abbot of Broomhall was seized in Fee, in Right of his Monastery, of the Manor of Broomhall, and had Wreck by Prescription. The Manor by the Dissolution of Monasteries came to King H. 8. by which the Wreck, being a Royal Franchise, vested in him jure Coronæ: He grants the Office of High Admiral of England to the Lord Viscount L'Isle, with all Wrecks at Sea, and all other Profits to the said Office belonging: And after this he grants the Manor, &c. to B. under whom the said Plaintiff in the Action claims; but, as the Counsel for the Defendant urged, the Wreck being granted to the Lord L'Isle before, and not recited in the Grant to B. it did not pass by the Grant to B. and therefore the Plaintiff had no Title.

But Holt C. J. over-ruled this on Evidence at a Trial in Suffolk, that the Wreck belonged to the Manor by Prescription, and could not pass as appurtenant to the Office of High Admiral: And it being moved to have it found specially, it was refused, and a Bill of Exceptions was ten-

dered and sealed, and a Writ of Error brought, and Error assigned; and it was argued by Hawles, Solicitor General, and Whitaker, that besides the Grant of Wreck appurtenant to the Office of High Admiral, there is also a Grant of Maris ejecta, which is not relative to the Office, and will comprehend a Grant of all Wreck then in the Hands of the King; and the restraining Clause of eidem spectant' & pertinent shall not relate to the Wreck of Sea granted, for Wreck cannot belong to the Office by Prescription, for the Office itself is within Time of Memory.

But per Holt; Wrecks may be claimed by Prescription, and may belong to the Lord Admiral by Prescription; for the Lord Admiral's Office is an ancient Office, tempore dont, though it might not be vested in a single Person, or in the same Manner as it is now. Dy. 152. b. There is a Prescription for the Lord High Admiral to grant the Office of Register of the Admiralty for Life; and he made no Doubt but some Wreck might belong to the Admiral by Prescription, as that about the Cinque Ports, and such Places where he was most conversant in ancient Time: And as to the Objection, in regard that there is but one Concessit, or Word of Grant, all the Clauses shall be taken to be dependant on it, and the Clause of Restraint shall extend to all of them; otherwise if there had been any Word of Grant intermediate; and Judgment was affirmed.

## W R I T S.

Goodwin *versus* Beakbean. Mich. 10 W. 3.

**A** Scire facias against an Administrator, upon a Judgment obtained against the Intestate, was tested (1.)  
 24 October, and returnable die Lunæ prox. post Car: hew  
 mensẽm Michaelis, which was the 31st Day of 468, 469.  
 October; and an Alias Scire facias was taken out tested upon  
 the Day of the Return of the first Writ, and returnable Die  
 Lunæ prox. post crastinum animarum, which was the 7th of  
 November.

Upon



Upon two Nihil returned, Judgment was against the Defendant by Default; and the Intestate's Goods were taken in Execution, by virtue of a Fieri facias.

It was moved to set aside the Judgment, and to have Restitution, because these Writs of Scire facias were irregular; for, between the Teste of the First and the Return of the last, there were not fifteen Days, exclusive of the Days of the Teste and Return.

To which it was answered, That these Writs were as they ought to be, for there are eight Days inclusive between the Teste and Return of each Writ; and the second Writ must always bear teste upon the same Day on which the first was returnable, and therefore of Necessity that Day must be reckoned twice.

See T. Jones  
228.

Besides, no Objection lies to the Writs singly; therefore the putting them together shall not make them irregular by a joint Computation of the Time.

The whole Court was of that Opinion. The Plaintiff had Judgment.

### Mason *versus* March. 11 W. 3.

(2.)  
3 Salk. 397.

**I**n false Imprisonment laid to be in the Vacation, the Defendant pleaded a Writ taken out Teste in the Term, by which he arrested the Plaintiff, &c.

By Holt C. J. The Plaintiff may reply, That notwithstanding the Teste of the Writ, he took it out in Vacation Time; for where the Writ is in Support of Justice, no Averment shall be made against it: But it is otherwise where it is to justify a Wrong.

1 Lutw. 337.  
2 Lill. Abr.  
716.

A Writ without a Teste is not good, for the Time may be material when it was issued, and it is proved by the Teste; and if it be out of the Common Law Courts, it must bear Date some Day in Term, not being Sunday; but in Chancery Writs may be issued in Vacation as well as Term-Time, as that Court is always open. And Writs may be renewed every Term until a Defendant is taken; but in B. R. after five Terms, a new Latitat must be brought, and the Plaintiff may not renew the old one.

Trin. 12 W. 3.  
Cases W. 3.  
404.

Holt C. J. By the ancient Rule of Court there could not be a voluntary Appearance, without a Writ were taken out; but even now there must be a Writ taken out before or after, for without a Writ the Parties have no

Day in Court, without which they cannot appear; and he saw no Difference between a voluntary Appearance and one upon a Capi Corpus: For sure the Plaintiff ought not to be put in a worse Condition for his Kindness in not arresting the Defendant. If a Writ be returnable *crast animar*, and a voluntary Appearance to it, it will be the same as if it were upon a Capi Corpus.

Shirley *versus* Wright. Trin. 1 Ann.

**I**N Debt for an Escape of one taken upon a Ca. sa. which appeared to be returnable the Term next but one after the Terme, so that a Term intervened: After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Writ was merely void, and consequently there could be no Escape, and the Sheriff did well to let him go, 3 Cro. 468. On the other Side, to shew that a Writ may be faulty, and yet not void, were cited Poph. 271. Dy. 67. 175. 21 H. 7. 16. Sy. 339. 1 Ro. 242. 3 Cro. 188. Mo. 274. 1 Cro. 271. 2 Bull. 256. 2 Ro. Rep. 432.

Holt C. J. Escape lies against the Sheriff. In mean Process, if a Term be omitted, the Writ is void in all Actions personal.

But in Executions, a Ca. sa. omitting a Term is not void. The Plaintiff had Judgment, nisi, &c.

In the same Case, Holt C. J. said, If a Writ of Execution bear Terme out of Term, the Sheriff is justifiable, and yet shall not be liable to an Action of Escape, for it is a void Writ.

Harvey *versus* Bread. Pasch. 3 Ann.

**W**RIT of Enquiry was returnable Tres Trin. which happened to be on a Sunday, so that the Essoins were kept on the Monday. The Writ is returned to have been executed the 14th of June, which was the Day after the Return, viz. Monday: Tho' per tot' Cur', a Writ may be executed on the Day of its Return, yet if it cannot be legally done on that Day, they shall not do it the next Day; and the Kalender is Law, of which we as Judges must take notice.

Williams *versus* Hoskins. Mich. 3 Ann.

(5.)  
Mod. Caf.  
310.

**I**N this Case per Holt C. J. & Cur', Where a Writ is good for any Thing that doth appear on the Face of it, altho' it be not apposite to the Purpose intended, it may not be altered; for to amend would be to make a new Writ.

Ibid. 133.

Holt C. J. It is illegal to fill up a Writ after it is sealed; and whoever is arrested by Virtue of such Writ, may take Advantage of it. A Defendant cannot except to quash a Writ till a Return thereto be made and filed; And all Writs are to be Returned and Filed in due Time, because the Filing them is the Warrant for the Proceedings.

Mod. Caf.  
L. & E. 243.

In the Case of Crowther and Wheat, the Court was of Opinion, that if any Alteration be made in any Writ by a Clerk in a Thing immaterial, after Sealing the Writ, it will do no harm; nor is it any Ground to quash the Proceedings; And if it be material, before the Writ was sealed, that will not vitiate; but if on Motion against the Clerk who made many Rasures and Interlineations in this Writ, it appeared to be done after the Writ was sealed, it is a Misdemeanor punishable.



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# A T A B L E

O F T H E

## Principal Matters.

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| <p>6. <i>A.</i> is privy to a Design of <i>B.</i> to beat <i>C.</i> accompanies <i>B.</i> in putting the Design in Execution; but doth not otherwise aid, &amp;c. if <i>C.</i> dies, <i>A.</i> and <i>B.</i> are both Guilty of Murder. <span style="float: right;">Page 480</span></p> <p>7. <i>A.</i> accompanies <i>B.</i> in an unlawful Action, in which <i>C.</i> is not concerned; after that Action is over, <i>C.</i> comes in the Way of <i>B.</i> <i>B.</i> kills <i>C.</i> without the Assistance of <i>A.</i> <i>A.</i> is not Guilty of Murder. <span style="float: right;">481</span></p> <p>8. <i>A.</i> gives the first Stroke without just Cause, <i>B.</i> strikes again, <i>A.</i> kills him; whether this be Murder? <span style="float: right;">482, 484</span></p> <p>9. A Denial of a Key by a Servant to his Master, no Provocation to extenuate Murder to Manslaughter. <span style="float: right;">482</span></p> <p>10. Within what Time the Appeal is to be brought? <span style="float: right;">483</span></p> <p>11. Tho' <i>A.</i> who actually killed, be acquitted, yet others present, aiding, &amp;c. may be found guilty: For all present, &amp;c. are Principals in Murder. <span style="float: right;">484</span></p> <p>12. Where an Officer is killed in a Riot, he that began the Riot is guilty of Murder, tho' he did not the Fact, &amp;c. <span style="float: right;">Ibid.</span></p> <p>13. The Distinction between Murder and Manslaughter, how occasioned. <span style="float: right;">Ibid.</span></p> <p>14. What Provocations will extenuate the Killing to Manslaughter? <span style="float: right;">484, 485, 489, 491</span></p> <p>15. Killing in a sudden Affray, made to deliver a Stranger from a wrongful Imprisonment, is not Murder, but Manslaughter. <span style="float: right;">487, 489, &amp;c.</span></p> <p>16. When an Officer is not in Exe-</p> | <p>cution of his Office, whether he be particularly protected by Law. <span style="float: right;">Page 487, 488</span></p> <p>17. Whether a Pardon for Murder may be allowed without a Writ of Allowance? <span style="float: right;">519</span></p> <p>18. Whether Murder can be pardoned, and by the express Word? <span style="float: right;">519, 520</span></p> <p>19. Pardon of Murder on Condition, the Condition must be performed, and the Court will not suffer a third Person to prevent it. <span style="float: right;">521</span></p> <p>20. Pardon of Murder must recite the Indictment. <span style="float: right;">Ibid.</span></p> <p style="text-align: center;">See Appeal per totum.</p> |
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